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THE TRANSMISSION OF WEALTH AT DEATH IN A COMMUNITY PROPERTY JURISDICTION

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This article reports the results of an empirical study of the distribution, disposition and taxation of wealth at death in a community property state—Washington.[1] The study was undertaken in order to extend the existing data base regarding the transmission of property at death to two new areas: (1) the community property states; and (2) transfers by way of probate avoidance devices. The existing data base is derived primarily from three relatively recent studies of the transmission of wealth at death through the estate administration process in common law property states.[2] They provided answers to a host of very important and

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1. The study was supported in part by a research grant from the University of Washington School of Law to the author for the summer of 1974. Delbert Olenslager, J.D., 1973, University of Washington, assisted in the initial data collection effort and produced a valuable seminar paper on the subject. A present third year law student at the University of Washington School of Law, Richard Paroutaud, helped substantially with the final data collection in July 1974. A number of public officials facilitated the collection of data from the records in their care including, Mrs. Roberta Kaiser of the Washington Inheritance and Gift Tax Division, Mr. Harry C. Dunning, Chief of Vital Statistics for the King County Department of Public Health and Mr. Wayne Fullmer of the probate records section of the King County Division of Records and Elections. Although the files involved may technically be open to the public, because of the personal nature of some of their contents, information obtained from individual files has been treated as confidential in nature.

2. Those studies are, Ward & Beuscher, *The Inheritance Process in Wisconsin,* 1950 WIS. L. REV. 393 [hereinafter "the Wisconsin study" and cited as Ward & Beuscher]; Dunham, *The Method, Process and Frequency of Wealth Transmission at Death,* 30 U. CHI. L. REV. 241 (1963) [hereinafter "the Illinois study," and cited as Dunham]; M. SUSSMAN, J. CATES & D. SMITH, THE FAMILY AND INHERITANCE (1970) [hereinafter "the Ohio study," and cited as Sussman, Cates & Smith].

Additional valuable data are provided by the study Richard R. Powell and Charles Looker made of the probate and inheritance tax records of New York and Kings Counties, New York, for the years 1914–1929. Powell & Looker, *Decedents' Estates,* 30 COLUM. L. REV. 919 (1930). However, its utility is limited by its antiquity and its reliance upon statistics published by the court and tax authorities rather than files pertaining to individual decedents. Professor Sheldon J. Plager's article, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem,* 33 U. CHI. L. REV. 681 (1966), creatively used the previously published data in assessing the soundness of the methods by which common law property states assure a surviving spouse of some share in the estate of a deceased spouse. Previously published data are also used in

interesting questions regarding the ownership and disposition of property and the operation of the estate administration processes in non-community property jurisdictions. The need to obtain comparable data for a community property state was evident. The progress of the equal rights movement[3] has accentuated the need for empirical studies of co-ownership of marital property in community property states.[4]

Gibson, *Inheritance of Community Property in Texas—A Need for Reform*, 47 TEX. L. REV. 359 (1969), to support a proposal for an increase in a surviving spouses's intestate share of community property. A detailed analysis of the wills of all persons dying testate in Washtenaw County, Michigan, in 1963 and a sample of wills filed during the year 1963 in the Principal Probate Registry in London was published by Professor Olin J. Browder in 1969. *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303 (1969). Another recent study compared the costs of administering decedents' estates in a state which had adopted the Uniform Probate Code (Idaho) with those in a state which had not adopted the Code (North Dakota). Kinsey, *A Contrast of Trends in Administrative Costs in Decedents' Estates in a Uniform Probate Code State (Idaho) and a Non-Uniform Probate Code State (North Dakota)*, 50 N.D.L. REV. 523 (1974).

The literature in the general subject area also includes an English study conducted by an economist under the aegis of the London School of Economics, J. WEDGWOOD, THE ECONOMICS OF INHERITANCE (1929) and Professor Friedman's analysis of the wills left by 150 persons who died in New Jersey in 1850, 1875 and 1900. *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34 (1964). Statistics regarding federal estate and gift tax returns and collections are published from time to time by the Treasury Department. *See, e.g.*, INTERNAL REVENUE SERVICE, DEP'T OF THE TREASURY, STATISTICS OF INCOME—1970, FIDUCIARY TAX RETURNS (1973). Two studies published by the Brookings Institution contain valuable discussions of the federal estate and gift tax data and various proposals for reform of the transfer tax structure. G. JANTSCHER, TRUSTS AND ESTATE TAXATION (1967); C. SHOUP, FEDERAL ESTATE AND GIFT TAXES (1966).

3. Recently the movement has focused on the proposed 27th amendment to the Constitution: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. Res. 208 & S.J. Res. 9, 86 Stat. 1523 (1972). Some of the changes in property law which might be required if the proposed amendment were adopted are reviewed in Ryman, *A Comment on Family Property Rights and the Proposed 27th Amendment*, 22 DRAKE L. REV. 505 (1973).

4. Traditional legal scholarship has made valuable contributions to our understanding of marital property systems. *See, e.g.*, MATRIMONIAL PROPERTY LAW (W. Friedmann ed. 1955); Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729 (1974); Hahlo, *Matrimonial Property Regimes: Yesterday, Today and Tomorrow*, 11 OSGOODE HALL L.J. 455 (1973); Rheinstein, *The Transformation of Marriage and the Law*, 68 NW. U.L. REV. 463 (1973); Younger, *Community Property, Women and the Law School Curriculum*, 48 N.Y.U.L. REV. 211 (1973); *Community Property: Symposium on Equal Rights*, 48 TUL. L. REV. 560 (1974). Professor Glendon's recent article, *Matrimonial Property: A Comparative Study of Law and Social Change*, 40 TUL. L. REV. 21 (1974), is a valuable addition to the literature on the subject. It contains an interesting analysis of the different treatment the property of a hypothetical couple would receive under the laws of an American common law property state (Illinois), England, France and Germany. However, there is a need for empirical studies, which better reveal the circumstances and actions of the population. As Professor Hahlo observed, "[T]he laws that govern the position of women in any given country at any given time do not necessarily reflect the factual position." Hahlo, *supra*, at 455. The term "marital property" is used in this article as a synonym for "matrimonial

The results of such studies might (1) allay some fears of common law jurisdictions regarding the complexities and risks of adopting a system of co-owned marital property;[5] (2) provide information with which to address the property ownership problems which may arise from implementation of the Equal Rights Amendment;[6] and (3) aid in dealing with increased numbers of express or implied marital property partnerships in common law jurisdictions.[7] The present study should aid in dealing with such problems by establishing that married persons in a community property state dispose of their property in essentially the same ways as married persons do in common law states. A central finding of this study is that the marital property law appears to have very little impact on the disposition married persons make of their property at death. To place the present study in perspective and to facilitate comparison with common law studies on transmission of wealth, a brief introduction to the three leading studies may be helpful.

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property." The terms are used interchangeably in the literature. *See* MATRIMONIAL PROPERTY LAW (W. Friedmann ed. 1955). Perhaps my professional interest in federal estate and gift tax law is the origin of my preference for the shorter term. As my colleague John Huston observed, the federal tax laws speak of "marital deductions," not "matrimonial deductions." Treas. Regs. §§ 20.2056(a)–1, 25.2523(a)–1 (1958).

5. At a day-long program on community property presented at the University of British Columbia for a special Royal Commission on Family and Children's Law, some fears were expressed regarding the severity of transitional problems which might be encountered, the possible dislocation of the credit structure and the uncertain tax impact. For additional information regarding the program, which was held on April 27, 1974, see WASH. S. BAR NEWS, July 1974, at 14.

6. The experience of other industrialized western countries with a variety of marital property systems is also available to us. However, "scant attention has been paid to the experiences of other parts of the world." Rheinstein, *supra* note 4, at 463.

7. Due to the difficulty of drafting a marital property law which meets everyone's needs, spouses should be left relatively free to enter into agreements regarding the ownership and management of their property. However, even where there is no express agreement, courts in common law states may find that a couple jointly own the property they acquired during marriage. As the New York Court of Appeals has noted: "[W]e do not attempt a segregation of assets of husband and wife after a marriage of this duration. For all practical purposes, equity may content itself with considering the assets as *their collective property, as if their estates had merged.*" Rubenstein v. Mueller, 19 N.Y.2d 228, 225 N.E.2d 540, 543, 278 N.Y.S.2d 845, 849 (1967) (emphasis added). The implied partnership rationale may be used more frequently in the future to support an equitable division of marital property. Note, *The Implied Partnership: Equitable Alternative to Contemporary Methods of Post-marital Property Distribution,* 26 U. FLA. L. REV. 221 (1974).

Overall, however, specific legislation, although not completely satisfactory, is preferable to piecemeal judicial resolution. Two recent decisions illustrate the disparate results which the courts may achieve in cases involving property acquired with joint efforts. In Estate of Thornton, 81 Wn. 2d 72, 499 P.2d 864 (1972), the Washington Supreme Court held that a partnership may be implied where a man and a woman

I. STUDIES IN COMMON LAW JURISDICTIONS

In the first of the common law studies,[8] a law professor, J. M. Beuscher, and an agricultural economist, Edward H. Ward, examined a sample of probate proceedings for decedents who died in Dane County, Wisconsin, in the years 1929, 1934, 1939, 1941 and 1944. The sample for the Wisconsin study was drawn from death certificates of adult residents. However, the report on the study contained relatively little information regarding the characteristics of the overall sample, which reduces its utility for some comparative purposes. The second study[9] was conducted by Professor Allison Dunham of the University of Chicago Law School and is perhaps the best known of the studies. It focuses on 97 estate proceedings which were had in Cook County, Illinois, in 1953 and 73 such proceedings in 1957. The estates in the 1953 segment of the study were selected at random from estates opened in that year. The 1957 segment included all of the estates opened (73) for the first 481 adult residents of Chicago for whom death certificates were issued in 1957. In order to facilitate comparisons with the 1957 part of the Illinois study (1957 Chicago sample), several of the tables presented in this article are based upon the categories and classifications used in that study.

Both the Wisconsin and the Illinois studies relied almost exclusively upon probate court files as the source of data. In the third and most

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cohabit and work together to acquire property, even though they are unmarried. The Supreme Court of Canada, however, held that a married woman has no interest in property acquired in her husband's name. Murdoch v. Murdoch, [1974] 1 W.W.R. 361 (Can. 1973). One commentator has observed that the decision in *Murdoch* "aggravated the difficulties [of dealing with family property] and the controversy which it produced may impel the provinces to legislate a solution." Jacobson, *Murdoch v. Murdoch; Just about what the Ordinary Rancher's Wife Does,* 20 McGILL L.J. 308 (1974).

The Ontario Law Reform Commission has recommended a "new matrimonial regime under which the spouses would be separate as to property during marriage but upon its termination would share equally in property acquired in the course of the marriage." *Id.* at 320. "The new system recommended by the Commission would be the 'basic regime' for all future marriages unless the spouses 'formally elect to have their property relations either governed by the regime of separate property or by a marriage contract.'" *Id.* at 320–21. In that connection, Professor Jacobson noted that slightly more than one-half of the couples who married in Quebec between July 1, 1970, and December 31, 1973, exercised their right to opt out of the statutory regime. *Id.* at 321 n.61.

8. Ward & Beuscher, *supra* note 2.

9. Dunham, *supra* note 2.

recent study,[10] two sociologists, Marvin B. Sussman and Judith N. Cates, and a law professor, David T. Smith, examined a sample of estates which were closed in Cuyahoga County, Ohio, in 1965. The Ohio sample was drawn directly from probate records. Accordingly, the study did not include data regarding the characteristics of the overall population. Thus, it was not possible to make some of the calculations contained in the earlier studies (*e.g.*, the frequency of estate proceedings and the rate of testacy relative to the total number of deaths). However, the Ohio study went beyond the probate files and included interviews with surviving members of the decedents' families and a sample of lawyers concerned with probate process. It provides valuable insights into the attitudes of the survivors towards their decedents, the lawyers involved with the estates and the estate administration process.

Despite differences in sample selection and methodology, these common law studies made substantial contributions to our knowledge and understanding of the actual economic and social circumstances of decedents, their disposition of wealth and the operation of the estate administration process. The data collected in the studies have been used for a variety of purposes, such as the evaluation of the adequacy of existing laws and the support of law reform efforts.[11]

II. THE WASHINGTON STUDY

A. Summary

In more specific terms, objectives of the present study were (1) to generate data on the points covered by the earlier studies in order to facilitate comparative analysis; (2) to assess the impact of community property law on the ownership and disposition of property at death; (3) to measure the extent to which property is transferred outside the

10. Sussman, Cates & Smith, *supra* note 2. Also, the data for a pilot study focusing on the costs and time spent by lawyers in probating estates in Minnesota have been collected. AMERICAN BAR FOUNDATION, 1973 ANNUAL REPORT 7.

11. The data were used in the earlier studies to examine the extent to which testate distributions deviated from those which would take place under the intestate succession laws. Ward & Beuscher at 413; Dunham at 251 *et seq.* Also, as indicated in note 2 *supra*, Professors Plager and Gibson used the data to evaluate the operation of existing laws and to support proposed changes.

probate process; and (4) to evaluate some of the unusual features of the local law which might be suitable for adoption in other jurisdictions. Unusual features include the non-intervention executorship, pursuant to which a testator could direct that his estate be settled without court intervention,[12] and the statutory form of agreement (commonly called the community property agreement) by which spouses can agree upon the status of their property as separate or community and direct the disposition of part or all of the community property at death without court proceedings.[13] The extent to which the objectives were attained is briefly summarized in the following paragraph.

12. Under the version of WASH. REV. CODE § 11.68.010 (1963) which was in effect until recently, the procedure was available only if the decedent's will expressly invoked its provisions. The changes in the probate code which became effective October 1, 1974, made the non-intervention procedure generally applicable to the estates of both testate and intestate decedents. Ch. 117, §§ 13–25 [1974] Wash. Laws 1st Ex. Sess. 292–300. The Washington experience is recounted in detail, and a proposal for extending the procedure is made, in Fletcher, *Washington's Non-Intervention Executor—Starting Point for Probate Simplification*, 41 WASH. L. REV. 33 (1966). A similar procedure is also available and apparently widely used in Texas. TEX. PROBATE CODE §§ 145–54 (1956); *see* Woodward, *Some Developments in the Law of Independent Executors*, 37 TEX. L. REV. 828 (1959).

13. WASH. REV. CODE § 26.16.120 (1963), provides:

> Nothing contained in any of the provisions of this chapter or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner: *Provided, however,* That such agreement shall not derogate from the right of creditors, nor be construed to curtail the powers of the superior court to set aside or cancel such agreement for fraud or under some other recognized head of equity jurisdiction, at the suit of either party.

Professor Harry Cross has concisely described the basic scope of the statute as follows:

> By this statute the husband and wife can enter into an agreement in deed form upon the status and disposition of the whole or any part of the community property, which agreement takes effect upon the death of either. A common form of this agreement provides for survivorship whereby all community property is vested in the survivor, and in it also laymen who prepare many of them, embody both the present and prospective character of assets [from separate to community] . . . . To distinguish the common three-pronged contract from the agreement authorized by statute, the latter is here termed the "statutory community property agreement." The effect of such an agreement is to eliminate the testamentary power of each spouse as to his or her half of community property covered by the agreement.

Cross, *The Community Property Law in Washington*, 15 LA. L. REV. 640, 645 (1955).

In the present study, data was successfully obtained concerning the points covered in the common law studies. In general, the characteristics regarding the ownership and disposition of property by the Washington decedent population resembled to a remarkable degree those observed in the earlier studies. However, some of the deviations are surprising—for example, the proportion of testate decedents is almost 10 percent higher in the Washington study than in any of the preceding studies. Moreover, the Washington results strongly suggest that while the community property law affects the quantum of property available for disposition by married persons, it does not affect their disposition of it. As in the studies of other jurisdictions, a very high proportion of married decedents in Washington transferred all of their property to their spouses at death. A substantial number of married decedents in the Washington study made such a transfer by utilizing the community property agreement. Probate avoidance devices other than the community property agreement, *e.g.*, survivorship bank accounts and inter vivos gifts, were used as the principal method of transferring property by only a small proportion of decedents. Almost all the Washington testators authorized the settlement of their estates without court intervention. Although the general absence of formally administered testate proceedings inhibited comparative analysis of supervised and unsupervised proceedings, there was no indication that

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Idaho is apparently the only other state which also expressly authorizes such a form of agreement. The history of its provision was recently recounted by Professor Peterson:

> A familiar device for probate avoidance in this state has been the community property agreement, legitimatized by adoption of Idaho Code Section 32–921 in 1970. This section was repealed when the Code was adopted. The theory at the time was that its provisions were replaced and extended by Section 15–6–201 which describes as nontestamentary any written instrument effective as a gift, contract or conveyance, despite the fact that its effect is delayed until death. Title companies expressed doubt about insurability of titles, and, in the 1973 session, the Legislature amended this section to incorporate many of the provisions of the repealed Section 32–921. This was accomplished by adding the words "agreement to pass property at death to the surviving spouse" in describing the various instruments specifically described in Section 15-6-201. Agreements may extend to both separate and community property; the "community property agreement" label is no longer appropriate. Agreements must be in writing, acknowledged in the same manner as deeds, contain a description of all real property and be recorded before death in all counties in which real property affected by the agreement is located. Any alteration or amendment is accomplished by following the same route, except that the agreement is automatically revoked by divorce. Rights of creditors are specifically preserved.

Peterson, *Idaho's Uniform Probate Code: A Bird's-eye View*, 9 IDAHO L. REV. 133, 148 (1973).

employment of the non-intervention procedure disadvantaged any beneficiaries, creditors or other persons interested in the estate settlement process. On the other hand, use of the procedure did not appear to reduce either the length of time required to complete estate administration proceedings or the costs of administration. Overall, the most powerful incentives for avoiding probate were probably the delays and higher costs associated with probate.

The findings of this study support the recent change in the Washington intestate succession law which gives a surviving spouse all of a decedent spouse's interest in their community property regardless of survivorship of other relatives.[14] In addition, the results, together with the generally favorable experience with community property agreements in Washington over the past century,[15] suggest that a similar omnibus survivorship device should be made more generally available in Washington and elsewhere. The need may be met in Washington

14. WASH. REV. CODE § 11.04.015 (1963), as amended, Ch. 117, § 6 [1974] Wash. Laws 1st Ex. Sess. 288.

15. The first legislation authorizing such agreements was passed by the Territorial Legislature in 1879. § 29 [1879] Wash. Laws 81. The results of the present study support the view that the community property agreement often provides an economical, and apparently safe means of transferring property at death to a surviving spouse. When a community property agreement is executed by a couple, it should be supplemented by wills disposing of the property upon the death of the survivor or in the event the parties die simultaneously. None of the agreements examined attempted to dispose of the property in the event of the spouses' simultaneous deaths. Supplemental wills are necessary because the disposition called for under the Uniform Simultaneous Death Act may not be in accord with the spouses' intentions. *See* WASH. REV. CODE § 11.05.010 (1963). In some instances, however, the spouses' "back up" wills are inadequate because they fail to dispose of his or her property if the other spouse does not survive the testator. *See, e.g.*, Clises' Estates, 64 Wn. 2d 320, 391 P.2d 547 (1964). Wills are also important because they can be used to appoint testamentary guardians for minor children. WASH. REV. CODE § 11.88.080 (1963), and serve other functions which a community property agreement perhaps cannot. Apparently most couples who enter into agreements recognize the need also to have wills; the inheritance tax files indicate that 21 of the 31 decedents who died with community property agreements in effect also had wills.

There are some indications that the use of community property agreements has increased in recent years, perhaps due to educational efforts of unions and to changes in some lawyers' attitudes. *See* Brachtenbach, *Community Property Agreements–Many Questions, Few Answers*, 37 WASH. L. REV. 469, 481–82 (1962). The data presented in this article indicates that at least 29% of married decedents entered into community property agreements prior to death. *See* Table 4 *infra*. A paper written in 1972 reported that for the first calendar quarter of that year community property agreements were filed in the King County Dep't of Records and Elections at a rate slightly in excess of 3,000 per year. Wernecke, The Community Property Agreement, n.1–1 (unpublished seminar paper in University of Washington Law School Library).

16. The official comment to UPC § 6-201 states: "The sole purpose of this section is to eliminate the testamentary characterization from the arrangements falling within the terms of the section." The pertinent part of the section provides:

An insurance policy, contract of employment, bond, mortgage, promissory note,

by R.C.W. § 11.02.090, a modified version of Uniform Probate Code (UPC) § 6–201, which became effective on October 1, 1974.[16] That section appears to allow anyone to contract effectively with respect to the disposition of property at death. The language of the section is broad enough to validate a variety of devices ranging from pay-on-death (POD) bank accounts to invalidly executed (*i.e.*, unacknowledged) community property agreements.[17] Unfortunately, the results of the study also indicate a rather low level of professional competence in the preparation of wills, an unduly long average period of estate administration and a practice of awarding very liberal compensation for estate administration services.

B. Data Base and Sample Selection.

The present study is based upon an examination of death certificates, probate records and inheritance tax files for a randomly selected sample of 211 adults who died in King County, Washington, in the year 1969.[18] Initially a sample of 255 death certificates filed for dece-

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deposit agreement, pension plan, trust agreement, conveyance *or any other written instrument effective as a contract,* gift, conveyance, or trust is deemed to be nontestamentary, and this Code does not invalidate the instrument or any provision:

(1) that money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;

(2) that any money due or to become due under the instrument shall cease to be payable in the event of the death of the promisee or the promissor before payment or demand; or

(3) *that any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing,* including a will, executed at the same time as the instrument or subsequently.

(Emphasis added.) The Washington version of UPC § 6–201 is identical except for the addition of "joint tenancy, community property agreement" in the list of instruments in the section.

UPC § 6–201 has been criticized as being so broad that, "[i]t begins to look like all that is necessary is to get a third party into the act, as an agent, custodian, contracting party, or issuer, and the whole law of wills is displaced." Zartman, *An Illinois Critique of the Uniform Probate Code,* 1970 ILL. L.F. 413, 463.

17. *See* Parts II–T & II–U *infra.*

18. King County is a mixed urban, suburban and rural area of 2,128 square miles situated on Puget Sound in western Washington. WASH. OFFICE OF PROGRAM PLANNING & FISCAL MGMT., STATE OF WASHINGTON—POCKET DATA BOOK 1973 at 208 (1974). It includes the city of Seattle, which in 1970 accounted for 530,831 of the county's 1,159,369 residents. U.S. BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1970, 1 CHARACTERISTICS OF THE POPULATION (Pt. 49, Washington) at 49–6, 49–17 (1973). The year 1969 was chosen for a number of reasons. First, it was probable that the probate and inheritance tax records for persons dying in that year would be complete. Second, it was subsequent to the probate code revisions which were made in 1965 and 1967. Third, it was recent enough to reflect some changes in local

dents dying in 1969 were examined in the offices of the King County Department of Public Health.[19] Forty-four decedents were eliminated from the sample at this stage because at the time of death they were either under the age of 21 or were not residents of King County.[20] The names of the remaining 211 were checked against the name indices of King County estate proceedings and of Washington inheritance tax reports. Estate files had been opened for 82 (38.86 percent) of the decedents and inheritance tax reports had been filed for 114 (54.03 percent).

The data obtained from the inheritance tax files is particularly valuable because of its completeness and probable reliability.[21] The inheritance tax files provide more complete information than the probate files regarding the amount and type of wealth transferred by the individual decedents at death.[22] In addition, they provided the same type

economic conditions. Death certificates were chosen as the base for the sample in order to be in a position to ascertain the ratio of probate and inheritance tax proceedings to the number of deaths in a particular time period. Such measurements are not possible where, as in the Ohio Study, and the Illinois Study of estates opened in 1953, the samples are selected directly from probate files. Also, death certificates provide more accurate and complete information than do probate or inheritance tax files regarding a decedent's age, occupation, marital status and place of birth.

19. The certificates bore numbers which corresponded to 255 random numbers which were taken from a book of random numbers. THE RAND CORPORATION, A MILLION RANDOM DIGITS WITH 100,000 NORMAL DEVIATES (1955). The sample might also have been satisfactorily drawn by selecting death certificates according to a systematic method as was done in the Wisconsin study or the 1957 segment of the Illinois study. *See* M. SLONIM, SAMPLING 58 (1967).

20. Persons who died under the age of 21 were eliminated from the sample because they could not have executed a valid will in Washington. Legislation passed in 1970 authorized 18-year-olds to make wills, if otherwise qualified by law. WASH. REV. CODE § 11.12.010 (Supp. 1973). For details regarding the changes in the age of majority in Washington, see Comment, *Citizenship for Eighteen Year Olds*, 47 WASH. L. REV. 367 (1972). Nonresidents were eliminated from the sample because estate administration proceedings for them would occur in the state or county of their residence if at all. The rules regarding the venue of estate administration proceedings in Washington are set out in WASH. REV. CODE § 11.16.050 (1963).

21. Inheritance tax returns are executed under oath and must be notarized. INHERITANCE TAX DIV., WASH. DEP'T OF REVENUE, GUIDE TO INHERITANCE TAX REPORTING 26 (1974). In addition, it is a criminal offense to practice a:

> fraud upon the state of Washington relating to the ascertainment, determination and collection of inheritance taxes, by misrepresentation of facts, or concealment of facts, and any person or persons who assist therein, either as principal, agent or accessory, either before or after the fact, shall be deemed guilty of a gross misdemeanor.

WASH. REV. CODE § 83.52.020 (1963).

22. The inheritance tax forms required information regarding the decedent's interest in numerous types of property which are not subject to estate administration proceedings. Among them are survivorship bank accounts, joint tenancies in real or personal property, life insurance on the life of the decedent, trust assets, pensions and annuities and property transferred inter vivos for less than full value. WASH. DEP'T.

of data as the probate files for a substantial number (39) of decedents in the sample for whom no probate proceedings were had.[23] As noted above, the earlier studies were limited to decedents with estate proceedings—none included an examination of death tax records.[24]

TABLE 1

AGE DISTRIBUTION OF DECEDENTS OVER TWENTY YEARS OF AGE

Age	Percentage of Total King County Deaths In Each Age Range (1)	Percentage In Sample In Each Age Range (2)	Percentage of Sample About Whom Data Obtained From Probate and Inheritance Tax Files (3)	Percentage of Sample Decedents In Each Age Range About Whom Data Was Obtained (4)
20–29	2.69%	2.37%	1.75%	40.00%
30–39	2.75	1.90	1.75	50.00
40–49	6.85	7.11	4.39	33.33
50–54	5.46	3.79	3.51	50.00
55–59	7.49	7.11	7.89	60.00
60–64	8.96	9.95	14.04	76.19
65–69	10.18	10.43	14.91	77.27
70–74	11.83	12.32	7.02	30.77
75–79	13.86	16.11	20.17	67.65
80–84	14.56	14.69	14.91	54.84
85 and over	15.39	14.22	9.65	36.67
Total (No.)	100.02%* (9,303)	100.00% (211)	99.99%* (114)	54.03% (114)

* Rounding-off figures to the nearest one-hundredth caused the sums to deviate from 100.

OF REVENUE INHERITANCE TAX REPORT (S.F. No. 17) (rev. July 1967); WASH. DEP'T OF REVENUE, RETURN FOR DETERMINATION OF INHERITANCE TAX WITHOUT PROBATE (Form 4832) (rev. May 1972). The sample of inheritance tax returns inspected in connection with this study were generally completed in detail, even in the instances in which no tax was due.

23. The inheritance tax files contained information regarding 32 (15.16%) of the decedents for whom no probate file had been opened. They also provided information regarding seven (3.32%) of the decedents for whom wills were filed, but no estate proceedings were had.

24. The Illinois study, however did include "looking at the inheritance tax returns filed elsewhere in the public records" for a sample of 12 decedents "to determine the

C. Sample Size and Composition.

The sample of 211 decedents constitutes 2.27 percent of the 9,303 deaths of persons over the age of 20 which occurred in King County in 1969. Table 1 shows the age distribution of all King County decedents (column 1) and of the decedents in the sample (column 2). The age distribution for the 114 (54.03 percent) decedents in the sample about whom information was obtained from the probate and inheritance tax files is shown in column 3.[25] The high degree of correlation between the figures shown in the first three columns indicates the propriety of utilizing a random sampling technique and supports the adequacy of the sample.

Comparative data appeared only in the Illinois study. Interestingly, the Illinois study reported that the age ranges of the persons who died in Chicago in 1957 were substantially lower than those of the King County decedents. For example, 26 percent of the Chicago decedents were over 75 years old[26] as compared with 43.81 percent of the King

extent to which a deceased died with taxable assets that were not included within the probate estate." Dunham at 264. Apparently, the inheritance tax records were not searched in that study for information regarding individuals for whom no estate administration proceedings had been commenced.

25. In contrast, the Illinois study, which relied solely upon the probate court records, generated data about only 73 (15.2%) of the 1957 sample of 481 decedents. *Id.* at 243.

26. The Illinois study reported the following age distribution of persons who died over the age of 20 in Chicago during 1957 (column 1) and in their sample (column 2):

Age	Total Chicago Deaths - 1957	In Sample
20–29	2%	2%
30–39	4	5
40–49	9	9
50–54	7	7
55–59	9	10
60–64	13	12
65–69	15	17
70–74	15	15
75–79	11	10
80–84	8	8
85 and over	7	5
Total (Number of Units)	100% (39,712)	100% (481)

Dunham at 243. Neither the Ohio nor the Wisconsin study included age distributions which could be compared with those of either the Illinois or the present study. The lack of comparability of the Wisconsin and Illinois studies is criticized in Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681, 715–16 (1966):

County decedents. The present study includes 112 males (53.08 percent) and 99 females (46.92 percent).[27] The corresponding figures for Chicago were 268 males (55.72 percent) and 213 females (44.28 percent).[28] The mean age of the decedents in the King County sample was 68.54 years.[29]

The death certificates identified only six decedents (2.8 percent of the total sample) as being members of ethnic minorities.[30] Estate proceedings were had for three of the decedents, two of whom died testate.[31] Overall, however, the data regarding minority decedents were insufficient to permit any useful analysis.[32]

Some types of information, such as that on spouses' elections, was not reported by either study. Furthermore, the process of analyzing and collating the reported information was made doubly difficult by the absence in a number of instances of clear identification of the data source. Nevertheless, these two studies yielded a wealth of important information on property transmission practices and established conclusively the value of probate court records as a source of useful empirical data.

The design of the present study was based principally upon that utilized in the 1957 segment of the Illinois study. However, some innovation was necessary because the present study was conducted in a community property jurisdiction and sought to augment data from the probate records with information from the inheritance tax files.

27. In 1969 there were a total of 30,504 deaths in the State of Washington, of which 17,730 (58.12%) were male and 12,774 (41.88%) female. WASH. DEP'T SOCIAL & HEALTH SERVICES, 1968–1969 VITAL STATISTICS SUMMARY 53 (1970). The total for King County was 9,938, of which 5,576 (56.11%) were male and 4,362 (43.89%) female. *Id.*

28. Dunham at 246.

29. The mean age of the decedents was not indicated for either the Wisconsin or the Illinois study. The mean age of the decedents in the Ohio study, which was limited to ones for whom probate proceedings were had and closed, was 67.8 years. Sussman, Cates & Smith at 65.

30. Persons of minority ancestry accounted for 5.80% of the total number of King County decedents in 1969. WASH. DEP'T SOCIAL & HEALTH SERVICES, 1968–1969 VITAL STATISTICS SUMMARY 53 (1970).

31. The available information regarding the minority decedents may be summarized as follows:

	Number of Decedents	Testate	Intestate
Asian	3	2	-
Black	1	-	-
Filipino	2	-	1
Total	6	2	1

The two testate estates, both of which were those of decedents of Asian ancestry, substantially exceeded the mean and median sizes of testate estates shown on Table 9 *infra*. The lone intestate estate was that of a young male who died accidentally. It was slightly below the mean and median sizes of intestate estates.

32. A study focusing on the distribution and disposition of property at death by minority decedents should be undertaken. One of its major objectives could be to

D. Marital Status

Data regarding the marital status and sex of the Washington sample of decedents are presented in Table 2. The sample included 106 (50.24 percent) married persons, 66 (31.28 percent) widowed persons, 18 (8.53 percent) divorced persons and 21 (9.95 percent) persons who had never married. The 1957 Chicago sample included almost identical percentages of married persons (49.69 percent) and widowed persons (31.60 percent).[33] However, the Chicago sample in cluded a lower percentage of divorced persons (3.74 percent) and a higher percentage of single persons (14.97 percent).[34] The figures presented in Table 2 suggest that the marital status of an individual at death is highly influenced by one's sex. Almost three-fourths (73.50 percent) of the married decedents were males; over four-fifths (80.30 percent) of the widowed persons were females.[35] Comparison of this

TABLE 2

MARITAL STATUS AND SEX OF WASHINGTON SAMPLE

Marital Status	Male		Female		Total	
	Number	Percent	Number	Percent	Number	Percent
Never Married	8	7.14%	13	13.13%	21	9.95%
Divorced	13	11.61	5	5.05	18	8.53
Widowed	13	11.61	53	53.54	66	31.28
Married	78	69.64	28	28.28	106	50.24
Total	112	100.00%	99	100.00%	211	100.00%

measure the extent to which existing legal mechanisms for the transfer of property at death are adequate and are utilized.

33. Dunham at 247.

34. *Id.*

35. The preponderance of married men and widows in the sample is probably attributable in part to the greater longevity of women. The average age of male decedents in the sample was 66.69 years, whereas the average age of female decedents was 70.64. The disparity between the average ages of all unmarried female decedents and married female decedents is even greater: 75.35 years and 58.68 years respectively. The composition of the sample and disparities in ages may be traceable to such factors as a tendency for men to marry women several years younger than themselves. Other less obvious factors may also affect the marital status of the decedents, such as the greater ease with which older males in our society remarry after the death of a

data with the Illinois study is not possible; it did not indicate the sex of the persons who were included in each category of marital status.[36]

E. · Place of Birth

The Washington sample included 40 (18.96 percent) persons born in foreign countries (25 males and 15 females), 49 (23.22 percent) born in Washington state (23 males and 26 females), and 122 (57.82 percent) born in other states (64 males and 58 females). The principal foreign countries of birth were Canada (7), Sweden (7), Germany (4) and Great Britain (3).[37] Most of the inward migration of native born took place from midwestern states: Kansas (11), Wisconsin (10), Minnesota (10), North Dakota (9). The remaining 82 native born decedents came from 26 other states.[38] The place of birth did not appear to correlate significantly with marital status at death, accumulation of property, frequency of testacy or any other characteristic observed in the study.

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spouse. A recent article reported that remarriage rates for widowed and divorced males was considerably higher than the comparable remarriage rates for females, and that the median ages of males at remarriage was several years greater than that of females. Schoen & Nelson, *Marriage, Divorce, and Mortality: A Life Table Analysis*, 11 DEMOGRAPHY 267, 283 (1974).

36. The Ohio study also failed to indicate the sex of the persons it categorized by marital status. Sussman, Cates & Smith at 70.

37.

PLACE OF BIRTH
OF FOREIGN BORN
WASHINGTON SAMPLE

Country of Birth	Male	Female	Total
Canada	4	3	7
Sweden	5	2	7
Germany	3	1	4
Great Britain	1	2	3
Finland	1	2	3
Japan	2	0	2
Norway	1	1	2
Philippines	2	0	2
Poland	1	1	2
Russia	1	1	2
Yugoslavia	1	1	2
China	1	0	1
Denmark	1	0	1
Italy	0	1	1
Latvia	1	0	1
	25	15	40

F. Frequency of Estate Administration Proceedings and of Testacy

Earlier studies measured both the frequency of estate administration proceedings and the rate of testacy for the samples as a whole and according to certain social, economic and familial characteristics. The frequency of estate proceedings was assumed to be generally indicative of the extent to which wealth was accumulated in the adult population.[39] The studies also indicated that the frequency of estate proceedings was positively associated with age and occupational status[40] and that the rate of testacy was positively associated with both age and occupational status and the extent of the decedent's property ownership.[41] The measurement of those rates for the Washington

38.

PLACE OF BIRTH
OF NATIVE BORN
WASHINGTON SAMPLE

State of Birth	Male	Female	Total
Oregon	7	4	11
Illinois	3	3	6
Massachusetts	5	1	6
Michigan	2	4	6
Missouri	1	5	6
Ohio	2	4	6
Iowa	3	2	5
Nebraska	2	3	5
Arkansas	1	2	3
Kentucky	2	1	3
South Dakota	2	1	3
California	2	0	2
Connecticut	1	1	2
Indiana	1	1	2
North Carolina	2	0	2
Oklahoma	1	1	2
Pennsylvania	2	0	2
Texas	0	2	2
Alabama	1	0	1
Idaho	1	0	1
Louisiana	0	1	1
Maryland	1	0	1
Montana	1	0	1
New Jersey	1	0	1
Rhode Island	1	0	1
Tennessee	0	1	1
Total	45	37	82

39. Ward & Beuscher at 399–401; Dunham at 244.
40. Ward & Beuscher at 396–97; Dunham at 243–45.
41. The Wisconsin study did not examine the rate of testacy according to age. It also did not find any association between the use of wills and occupation. Ward &

sample is not particularly helpful for analytical purposes because many of the decedents utilized community property agreements or other probate avoidance devices to transfer their property at death. However, the rates recorded in the present study are generally in accord with those of the earlier studies.

As mentioned above, estate files were opened for 82 (38.86 percent) of the 211 decedents in the Washington sample.[42] However, in seven instances only the will was filed and no estate administration actually took place.[43] In three of these seven instances the decedent's property passed to the surviving spouse by reason of a community property agreement and there was no need to conduct any court proceedings. No inheritance tax return was filed in two other instances which suggests that the decedents involved did not own a significant amount of property. It is unclear why no further proceedings took place for the remaining two decedents. The families of the decedents for whom no proceedings were conducted apparently distributed any property the decedents owned without judicial assistance.[44]

Estate administration proceedings were conducted for the remaining 75 decedents (35.54 percent of the sample) for whom estate files had been opened. In contrast, proceedings were had for 42.2 percent of the total Wisconsin sample of decedents for 1929, 1934, 1939,

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Beuscher at 411–14; Dunham at 248. The Ohio study concluded that "while will making was correlated with age, the imminence of death did not account for the rate of testacy in either the decedent sample or the survivor population." Sussman, Cates & Smith at 81. It also reported that "[e]conomic class was found to operate independently of age in relation to testacy," *id.* at 82, and, "testacy was found to be associated with high occupational status for those under age 60." *Id.*

42. *See* Part II–B *supra.*

43. The small number of filed-only wills is mildly surprising. WASH. REV. CODE § 11.20.010 (1963) requires a person having custody of a will to:

> deliver said will to the court having jurisdiction or to the person named in the will as executor, and any executor having in his custody or control any will shall within forty days after he received knowledge of the death of the testator deliver the same to the court having jurisdiction. Any person who shall wilfully violate any of the provisions of this section shall be liable to any party aggrieved for the damages which may be sustained by such violation.

The extent of the failure to comply with the statute is suggested by the fact that wills were not filed in 17 of the 21 instances in which the inheritance tax reports stated that the decedents died having both a will and a community property agreement. The Illinois study reported a pilot study in which no proceedings were conducted for about 50% of the wills which were filed. Dunham at 247 n.14.

44. The Illinois study also reported that court personnel suggested that extrajudicial distributions within the family was one reason for the large number of instances in which there were no proceedings beyond filing of the will. *Id.*

1941 and 1944,[45] and for only 15.2 percent of the 1957 Chicago sample.[46] There has been no explanation for the wide disparity in the rates observed in those two studies. Differences in demographic characteristics and possibly in the availability and use of probate avoidance devices may partially explain the disparity. In addition, when the ages of the decedent populations covered by those studies are taken into account, the Chicago sample may more fully reflect the extent to which the depression of the 1930's prevented individuals from accumulating any transmissible wealth.

The Wisconsin and Illinois studies both reported that estate administration proceedings were conducted for a substantially smaller percentage of females than males.[47] The marital property law of those states and the paucity of employment opportunities for women probably account for a major part of the difference. By way of comparison, in the present study estate proceedings were conducted for 37.37 percent of the female decedents and 33.04 percent of the males. The essential equivalence of the rates may be attributable in part to the community property system.[48] However, only 24.32 percent of the females for whom proceedings were initiated were married at the time of death.[49] A substantial number of estate proceedings are conducted for women in all states because of their greater longevity and the overwhelming tendency of married persons to transfer all of their property to the surviving spouse at death. In addition, the percentages for Washington may be distorted because of the much larger number of males in the sample who utilized probate avoidance devices to dispose of their property.[50]

45. Ward & Beuscher at 396.
46. Dunham at 243–44.
47. Ward & Beuscher at 396 (34.5% of females; 65.5% of males); Dunham at 246 (44.3% of females; 55.7% of males).
48. The probate and inheritance tax files for the married female decedents indicated that all of the property owned by them at death was community property. It is not possible to determine the number of such decedents who would have owned property subject to estate proceedings in a common law state. Presumably, however, proceedings could have been conducted for at least the 37.50% whose death certificates indicated an employment history. Of course the characterization of property as community may be influenced by factors such as the absence of an inheritance tax marital deduction in Washington or the absence of any clear record of the actual character of the property.
49. Substantially the same percentage was reported in the Illinois study: 20 (29.41%) of the 68 women for whom estate proceedings were conducted were married at death. Dunham at 249.
50. Twenty-seven (87.10%) of the 31 community property agreements were effective for male decedents. Given the tendency for older males and younger females

Of the 75 decedents for whom estate proceedings were conducted, 59 (78.67 percent) were testate. Interestingly, the rate of testacy for the Washington decedents with estate proceedings was 30 percent higher than recorded in Wisconsin, 20 percent higher than in Illinois and 10 percent higher than in Ohio.[51] The very high rate recorded in the present study is particularly surprising in view of the widespread use of community property agreements and other probate avoidance devices. Testate proceedings were conducted for 31 (83.78 percent) of the 37 females for whom estate administration proceedings were had and for 28 (73.68 percent) of the 38 males. The great preponderance of testate over intestate proceedings may reflect the success of efforts made by various organizations to inform the public of the advantages of having a will.[52] The testate dispositions of property most often differed from the distribution called for by the intestate succession law. However, the greater use of wills is probably not attributable to the testators' independent awareness of the provisions of the intestate succession law prior to consulting an attorney. An individual's decision to consult an attorney and to execute a will is probably seldom based upon a knowledge that the distribution called for by the intestate succession law does not coincide with the individual's dispositive intent. As noted below,[53] testacy appears to be a function of wealth and is probably often the product of occupational or social contacts with lawyers.

G. Frequency of Inheritance Tax Estates

Data collected in this study from both inheritance tax and probate files provides broader and perhaps more reliable indications regarding the overall ownership and disposition of property at death than the earlier studies which relied almost exclusively upon data from probate

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to intermarry and the greater longevity of females, *see* note 35 *supra*, community property agreements will nearly always be effective for a much larger proportion of males than females.

51. The Wisconsin study reported 47% testate estates, Ward & Beuscher at 411; the Illinois study reported 57.65%. Dunham at 248. The Ohio study reported 68.74% testate estates, which it noted was "the highest ratio of testate to intestate cases found in a United States study." Sussman, Cates & Smith at 63.

52. *See, e.g.*, AMERICAN ASSOCIATION OF RETIRED PERSONS, YOUR RETIREMENT LEGAL GUIDE 17 (1974), and pamphlets commonly made available by bar associations and financial institutions.

53. *See* Part II–L *infra*.

files. As noted above,[54] the inheritance tax files provided data regarding 114 decedents of which 75 had some estate administration proceedings. For convenience, these 114 decedents are referred to as "decedents with inheritance tax estates." The percentage of decedents with inheritance tax estates (54.03 percent) is more indicative of the extent of the population who die owning a significant amount of property than is the percentage of decedents with estate proceedings alone.[55] Over 18 percent of the decedents in the sample (39 of 211) utilized probate avoidance devices to dispose of their property.[56] If the users of such avoidance devices and the decedents who disposed of their property by will are taken together, 98 of 211 (46.45 percent) of the decedents in the sample made an effective expression of intent regarding the disposition of their property at death.

H. Classification by Occupation

Table 3 presents the data regarding the occupation and sex of the total sample (column 1) and of the decedents with inheritance tax estates. The latter are distributed in columns (2)–(6) according to the principal method by which they transferred their property at death. The decedents with testate and intestate estate proceedings are shown in columns (2) and (3). Column (4) shows that some married decedents in most occupational classes used community property agreements (CPA's) to transfer their property at death. Eight decedents used other probate avoidance devices as the principal means of transferring their property as shown in column (5). Six of these decedents used probate avoidance devices which are generally available in other states, *e.g.*, survivorship bank accounts and joint tenancy registration of securities. No joint tenancies in real property were encountered,

54. *See* text accompanying notes 42–45 *supra*.

55. In addition to the requirements of the federal and state tax authorities, it is generally necessary to open an inheritance tax file and obtain a tax clearance in order to satisfy title insurance companies and corporate stock transfer agents with regard to the transfer of the property interests of a decedent.

56. The community property agreement was the predominant device, used in 31 of the 39 cases (79.49%). Survivorship bank accounts, joint tenancies in securities, and life insurance beneficiary designations were the other most common methods. One married decedent had transferred all of his property into his wife's name several years prior to his death.

TABLE 3

TOTAL DECEDENT SAMPLE AND THOSE WITH INHERITANCE TAX ESTATES DISTRIBUTED BY OCCUPATION, SEX AND PRINCIPAL METHOD OF TRANSFERRING PROPERTY

Occupation	Decedents In Sample		Decedents with Inheritance Tax Estates—Principal Method of Transferring Property: Estate Proceedings				No Estate Proceedings				Total Cols. (2)–(5)		Percentage of Sample With Inheritance Tax Estates		
			Testate		Intestate		CPA		Other						
	M (1)	F (1)	M (2)	F (2)	M (3)	F (3)	M (4)	F (4)	M (5)	F (5)	M (6)	F (6)	M (7)	F (7)	Total
Professional & Supervisory	23	8	6	4	2	—	7	—	1	1	16	5	69.56%	62.50%	67.74%
Business Owners	9	4	5	1	—	1	2	—	1	—	8	2	88.89	50.00	76.9
Farmers	3	—	2	—	—	—	—	—	—	—	2	—	66.67	—	66.67
Clerical & Sales	14	11	2	3	1	2	4	—	1	1	8	6	57.14	54.55	56.00
Service	13	7	1	4	1	—	2	—	—	—	4	4	30.77	57.14	40.00
Skilled Labor	38	—	9	—	4	—	10	—	—	—	23	—	60.53	—	60.53
Unskilled Labor	11	—	2	—	2	—	2	—	—	—	6	—	54.55	—	54.55
Homemakers	—	68	—	19	—	3	—	4	—	3	—	29	—	42.65	42.65
Other	1	1	1	—	—	—	—	—	—	—	1	—	100.00	—	50.00
TOTAL	112	99	28	31	10	6	27	4	3	5	68	46	66.71%	46.46%	54.03%

probably because it was not possible to create them prior to 1961.[57] The previous inability to create real property joint tenancies may also account in part for the relatively heavy use of the community property agreement.

The occupational distributions shown in Table 3 confirm the finding of earlier studies that persons engaged in occupations which afford relatively greater opportunities to accumulate property (*e.g.*, business owners and professionals) are more likely to have estate proceedings[58] and to die testate.[59] The similarity of the percentages recorded for men and women throughout several of the occupational classes suggests that the influence exerted by occupation upon the accumulation and disposition of property is felt by employed persons of both sexes.[60] The distribution according to sex indicates that, overall, 25 percent (28 of 112) of the males and 31.31 percent (31 of 99) of the females in the sample had testate estate proceedings; 8.92 percent (10 of 112) of the males and 6.06 percent (6 of 99) of the females had intestate estate proceedings; 24.11 percent (27 of 112) of the males and 4.04 percent (4 of 99) of the females disposed of their property by way of community property agreements and 2.68 percent (3 of 112) of the males and 5.05 percent (5 of 99) of the females disposed of their property by survivorship accounts, inter vivos gifts or other probate avoidance devices. The much greater extent to which community property agreements are effective for male decedents is not surprising. As indicated in Table 2, above, male decedents are most often survived by a spouse (69.64 percent) and female decedents are most often widows at death (53.54 percent).

I. Classification According to Marital Status

The decedents in the sample and those with inheritance tax estates are distributed in Table 4 according to sex and marital status. The

57. Joint tenancies in real and personal property are authorized by WASH. REV. CODE §§ 64.28.010–.030 (1963), originally enacted, Initiative Measure 208 (1961). *See* the symposium dealing with Initiative 208 in 37 WASH. L. REV. 1–100 (1962).

58. Ward & Beuscher at 396; Dunham at 245.

59. Ward & Beuscher (inconclusive) at 412; Dunham at 248; Sussman, Cates & Smith at 78.

60. Four of the eight women in the professional and supervisory category had been public school teachers or principals. The fact that none of them had ever been married lends some support to a charge that women's rights were previously limited by restrictive social and employment practices.

data confirm the findings of the earlier studies that the rate of testacy for decedents with estate proceedings[61] is highest for widowed decedents and lowest for divorced decedents.[62] The high rate of testacy for the widowed decedents may be attributable to their generally greater

TABLE 4

TOTAL DECEDENT SAMPLE AND INHERITANCE TAX ESTATES DISTRIBUTED BY SEX AND MARITAL STATUS OF DECEDENT AND BY PRINCIPAL METHOD OF TRANSFERRING PROPERTY

		Decedents With Inheritance Tax Estates—Principal Method of Transferring Property					
Marital Status	Decedents In sample (1)	Testate (2)	Intestate (3)	CPA (4)	Other (5)	Total (6)	Percentage of sample (Col. (6) ÷ Col. (1)) (7)
Never Married:							
Male	8	1	1	—	1	3	37.50%
Female	13	6	1	—	2	9	69.23
Divorced:							
Male	13	3	4	—	—	7	53.85
Female	5	1	1	—	—	2	40.00
Widowed:							
Male	13	7	1	—	—	8	61.54
Female	53	19	1	—	2	22	41.51
Married:							
Male	78	17	4	27	2	50	64.10
Female	28	5	3	4	1	13	46.43
Total	211	59	16	31	8	114	54.03%

61. Column (2) divided by columns (2) & (3).

62. The rate of testacy was highest for widowed decedents in both the Illinois study, Dunham at 249, and the Ohio study, Sussman, Cates & Smith at 70. Divorced persons had the lowest rate in the Illinois study, Dunham at 247, and next-to-lowest (by 0.3%) in the Ohio study. Sussman, Cates & Smith at 70.

age and to the experience they may have already had with the process of transmitting property at death.[63] The low rate of testacy for the divorced decedents suggests that contacts with lawyers and the courts in divorce proceedings do not necessarily produce an increase in the rate of testacy. It appears that not all members of the bar provide their domestic relations clients with the full range of services they need. All too often a lawyer does not recommend and prepare a new will for a client he has represented in an adoption, divorce or other proceeding which affects either the validity of a previously executed will or the succession to property.

The percentage of decedents in each category with inheritance tax estates is shown in column (7). The highest frequencies were recorded for women who had never married (69.23 percent) and for married men (64.10 percent). The combined frequency of inheritance tax estates[64] for both sexes ranged from 59.43 percent for married decedents to 57.14 percent for decedents who had never married, 50 percent for divorced decedents, to 45.45 percent for widowed decedents. These results are in contrast to the frequency of testation[65] which was highest for widowed decedents (92.86 percent) and lowest for divorced decedents (44.44 percent).

J. Age of Decedents with Inheritance Tax Estates

The decedents in the sample and those with inheritance tax estates are distributed in Table 5 according to age and principal method of transferring property. The proportion of decedents with inheritance tax estates increases from 35.71 percent for the 40–49 age bracket, which is the first for which there is a significant number of decedents, progressively to 76.74 percent for the 60–69 bracket, after which it declines substantially. The pattern may reflect the accumulation of property by individuals through the end of their employment careers (the decade between ages 60 and 70), after which the property thus accumulated is gradually depleted in retirement.

63. In the Illinois study, Dunham surmised that the rate of testacy for widowed decedents might be higher because of "previous experience with death and its property problems in the immediate family. . . ." Dunham at 249. The authors of the Ohio study also suggested that age was probably a factor, noting that the age of widowed persons in the Illinois study was probably higher than for decedents of any other marital status. Sussman, Cates & Smith at 69.

64. *See* note 61 *supra*.

65. Column (6) divided by column (1).

TABLE 5

TOTAL DECEDENT SAMPLE AND INHERITANCE TAX ESTATES DISTRIBUTED BY AGE OF DECEDENT AND PRINCIPAL METHOD OF TRANSFERRING PROPERTY

		Inheritance Tax Estates—Principal Method of Transferring Property					
		Estate Proceedings		No Estate Proceedings			
Age of Decedent	Decedents In Sample (1)	Testate (2)	Intestate (3)	CPA (4)	Other (5)	Total Cols. (2)–(5) (6)	Percentage of Sample w/Inh. Tax Estates (7)
20–29	5	—	2	—	—	2	40.00%
30–39	4	—	1	1	—	2	50.00
40–49	14	3	2	—	—	5	35.71
50–59	23	3	4	6	—	13	56.52
60–69	43	15	6	10	2	33	76.74
70–79	66	18	1	9	3	31	46.99
80–89	49	16	—	5	2	23	46.94
90–99	12	4	—	—	1	5	41.67
Total	211	59	16	31	8	114	54.03%

The data generally confirm the positive association of age with testacy which was reported in the Illinois and Ohio studies.[66] These studies found that almost all of the decedents over 80 for whom there were estate proceedings had died testate.[67] The present study evidences the same phenomenon—all 20 of the decedents over 80 with estate proceedings were testate.

The general lack of intestate proceedings found in the present study is remarkable. Intestate proceedings were conducted for only 16 (7.58 percent) of the 211 decedents. Of the 127 decedents who died 70 years of age or older, 38 (29.92 percent) had testate proceedings; 14 (11.02 percent) used community property agreements; 6

66. *See* Dunham at 248; Sussman, Cates & Smith at 65.
67. Dunham at 248 (100%); Sussman, Cates & Smith at 65 (78.3% of decedents between 80–89; 83.3% of decedents between 90–99).

(4.72 percent) utilized other types of probate avoidance devices; and only 1 (0.79 percent) had an intestate proceeding. Of course, the making of a will or other expression of intent regarding the disposition of property at death is more likely to occur after an individual enters an age range for which death is not uncommon or "untimely."

The average ages of the decedents in the sample and with inheritance tax estates are summarized in Table 6.

TABLE 6

AVERAGE AGE OF DECEDENTS
(in years)

		Decedents with Inheritance Tax Estates				
Sex	Total Sample	Testate	Intestate	CPA	Other	Total
Male	66.69	71.57	52.90	67.63	78.00	67.54
Female	70.69	75.16	54.16	67.25	76.20	71.84

The table reflects the greater longevity of women and the relative youthfulness of the intestate population.[68] Several of the younger intestate decedents died as a result of accidents, the suddenness and improbability of which may explain their intestate condition. The youth of the intestate decedents is also reflected on Table 5, which shows that 2 of the 16 persons for whom intestate proceedings were conducted were under 30 years of age and a total of 9 were under 60.

K. Classification According to Age of Dispositive Instruments

The age of dispositive instruments utilized by decedents surveyed in the Ohio, Illinois and present studies is shown on Table 7. The instruments are distributed in the table according to the time elapsed between their execution and the decedent's death. The data indicate the last, but not necessarily the only, occasion on which the decedents

68. The average age of the testate decedents in the Ohio study was 69.6 years, whereas the average age of the intestate decedents was 63.7 years. Sussman, Cates & Smith at 65.

formally expressed their intention regarding the disposition of their property. A majority of the decedents included in the Ohio and Washington samples executed their wills 5 years or more prior to death.[69] Both studies reported that substantially less than 20 percent of the testators had executed wills within 1 year of death. In contrast, the Illinois study reported that almost 36 percent of the wills were executed within 1 year of death and only 30 percent more than 5 years prior to death.[70]

TABLE 7

TIME ELAPSED BETWEEN DATE OF INSTRUMENT AND DEATH

Time (in years)	Washington King County (1969) Wills*	Washington King County (1969) CPAs	Ohio Cuyahoga County (1964–1965) Wills	Illinois Cook County (1953 & 1957) Wills
Less than 1	12.1%	16.1%	14.6%	35.7%
1–3	18.2	29.0	16.6	17.3
3–5	10.6	9.6	14.8	16.3
5–10	30.3	25.8	25.6	21.4
10 or more	28.7	19.4	28.5	9.2
Total	99.9%	99.9%	100.1%	99.9%
(Number)	(66)	(31)	(453)	(98)

*The table includes 7 wills which were filed, but with respect to which no further proceedings were conducted.

The data regarding execution of community property agreements corresponds rather closely to the pattern for wills. In Washington relatively few dispositive instruments of any kind are written on the deathbed or immediately in contemplation of death. That contrasts sharply with the circumstances under which wills were executed in the

69. *Id.* at 66–67. In order to assure comparability, the age ranges used in Table 7 are the same as were used in Table 3 of the Ohio study. *Id.* at 66. The failure to keep wills more current is perhaps the major reason that six of the wills appointed executors who had predeceased the testator. *See* note 130 *infra*.

70. Dunham at 279.

19th century and earlier. Between 20 percent and 25 percent of the sample of 19th century Essex County, New Jersey, wills examined by Professor Lawrence Friedman were executed within 1 month of death.[71] Professor Friedman also pointed out that English 16th century wills had ordinarily been executed in the immediate presence of death, and suggested, "it is possible that the conversion of the will from a dying utterance to an 'estate plan' has been a process of several centuries."[72] The transition to more formally prepared wills probably accounts for the paucity of will contests.[73] A recognition of this transition by judges should result in a more relaxed application of rules regarding formalities of execution.[74]

The average time elapsed between the execution of a will and death was 83.24 months in the current study. The average time between the execution of a community property agreement and death was 67.19 months. It is difficult to explain the relatively greater recency of the community property agreements. It might be attributable in part to the availability of printed forms and the ease with which they may be executed. However, 15 of the 31 agreements examined bear some indicia of having been prepared by a lawyer.[75] The relative ages of the two types of instruments may also be related to the greater average wealth and longevity of the testate decedents and other socio-economic factors.[76]

Based upon the age of the wills, the more affluent testators did not engage in estate planning any closer to death than testators taken as a whole. The average age of the wills for the 15 testators for whom estate tax returns were filed was 80.13 months whereas the overall average was 83.24 months. The wills of the eight female testators averaged 80.75 months in age and those of the seven males, 79.43 months. Although it is possible that the wills of some of the affluent

71. Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34, 37–39 (1964).
72. *Id.* at 39 n.17.
73. The infrequency and lack of success of will contests has been noted in several studies. *See, e.g.*, Powell & Looker, *supra* note 2, at 932–33; Sussman, Cates & Smith at 184.
74. Professor Friedman suggested that the deathbed character of many 19th century wills may explain the emphasis courts put on precise compliance with the requirements of the wills statutes. Friedman, *supra* note 71, at 39.
75. Among the indicia were presence of an attorney's name and address on an agreement and notarization by an attorney.
76. Such factors include age, occupation, family circumstances and residence.

testators were reviewed but not revised at some time subsequent to their execution, it seems highly improbable that any of the five wills in that group which were more than 10 years old had been reviewed.[77]

L. Classification According to Size of Estates

Table 8 shows the extent of the wealth of decedents with inheritance tax estates and the methods they utilized in transferring their property. Estates are classified in it according to the gross value of the inheritance estate, which is more inclusive, and, therefore, a more accurate measure of a decedent's wealth, than the value of the estate subject to administration. The inheritance tax estate includes essentially the same items as the federal gross estate,[78] but it does not include the first $40,000 of insurance on a decedent's life which is payable to a person other than the personal representative.[79] In the case of a married decedent the inheritance tax estate and the federal gross

77. Taking into account changes in state and federal laws which occurred over the 10-year period, and probable changes in family circumstances, some revision of these wills would have been made upon review.

No doubt more wills would be reviewed and revised if clients were reminded of the desirability of periodic review. Perhaps because the preparation of wills has historically not been very remunerative, lawyers do not appear to remind clients periodically of the need to review their wills. Opinion 210 of the Committee on Professional Ethics and Grievances of the American Bar Association established the propriety of a periodical reminder. It also suggested that a lawyer is under a duty to advise his estate planning clients of any changes of fact or law which might adversely affect them:

> It is our opinion that where the lawyer has no reason to believe that he has been supplanted by another lawyer, it is not only his right, but it might even be his duty to advise his client of any change of fact or law which might defeat the client's testamentary purpose as expressed in the will.
>
> Periodic notices might be sent to the client for whom a lawyer has drawn a will, suggesting that it might be wise for the client to re-examine his will to determine whether or not there has been any change in his situation requiring a modification of his will.

AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 423–24 (1957). The technological advances made in recent years may facilitate the institution of more or less automated systems of sending reminders to clients.

78. *Compare* WASH. REV. CODE §§ 83.04.010–.080 (1963) *with* INT. REV. CODE OF 1954, §§ 2033–42. In the Wisconsin and Ohio studies the estates were classified according to the values shown on the inheritance tax notices filed in the estate proceedings. Ward & Beuscher at 399–400; Sussman, Cates & Smith at 73 n.20. The estates in the Illinois study were classified according to the values of the estates subject to administration as shown by documents in the probate files. Dunham at 263–64, 276–77.

79. WASH. REV. CODE § 83.16.080 (1963).

estate include only the decedent's one-half interest in community property and not the whole of it. Although all of the community property is subject to administration upon the death of the first spouse to die,[80] because a married person has power of testamentary disposition over only one-half of the community property,[81] it seemed more appropriate to base the classifications in the table according to the gross inheritance tax estate rather than the total estate subject to administration. That practice better comports with reality, but it may not improve the comparability of the figures with those of the earlier studies which were based in common law property states. The estates in the study were generally very simple and consisted almost entirely of property which was owned by the decedents outright. None of the estates involved any difficult issues of taxation which would affect their classification in the table.

Table 8 shows that a will was the most popular method of transfer utilized by individuals who accumulated any significant amount of

TABLE 8

INHERITANCE TAX ESTATES DISTRIBUTED BY VALUE OF GROSS INHERITANCE TAX ESTATE AND PRINCIPAL METHOD OF TRANSFERRING PROPERTY

Value of Inheritance Tax Estate	Testate (1)	Intestate (2)	CPA (3)	Other (4)	Total (5)
$0– 4,999	4	6	6	1	17
5,000– 9,999	4	5	6	1	16
10,000–24,999	19	4	14	2	39
25,000–49,999	13	—	4	2	19
50,000–99,999	9	1	—	1	11
100,000 and over	10	—	1	1	12
Total	59 (51.75%)	16 (14.04%)	31 (27.19%)	8 (7.02%)	114 (100.00%)

80. WASH. REV. CODE § 11.02.070 (Supp. 1974):
Upon the death of a decedent, a one-half share of the community property shall be confirmed to the surviving spouse, and the other one-half share shall be subject to testamentary disposition by the decedent, or shall descend as provided in chapter 11.04 RCW. The whole of the community property shall be subject to probate administration for all purposes of this title . . . .
81. *Id.*

property. For example, 32 (76.19 percent) of the 42 decedents who had inheritance tax estates of more than $25,000 in value had testate estate proceedings. Only one (2.38 percent) had an intestate estate proceeding. The other nine disposed of their estates by community property agreement (5) or other probate avoidance devices (4). If only decedents with estate proceedings are considered, 32 (96.97 percent) of the 33 decedents with estates of more than $25,000 in value were testate. Conversely, 11 (68.75 percent) of the 16 intestate proceedings were for decedents with estates of less than $10,000 in value. These distributions are similar to those of the Illinois and Ohio studies.[82] Not surprisingly, wealth appears to be positively associated with testacy and, to a lesser degree, with the expression of dispositive intent in any written form (will or community property agreement). This association may be traceable to the more frequent occupational and social contact which affluent persons probably have with lawyers.

The community property agreement appears to satisfy reasonably well the need for an efficient and economical means of transferring property at death from one spouse to another.[83] Community property agreements were most often used by decedents with estates of less than $25,000. Only 5 (11.90 percent) of the 42 decedents whose estates exceeded $25,000 in value used community property agreements to transfer their property, whereas 14 (35.90 percent) of the 39 decedents with estates in the $10,000–24,999 range used them. Smaller estates are often set aside to the surviving spouse under the award in-lieu-of-homestead provisions of the probate code.[84] A new procedure for the collection of a decedent's personal property by affidavit may partially meet the need for an efficient and economical means of transferring modest amounts of property at death regardless of marital status.[85]

82. Dunham at 250; Sussman, Cates & Smith at 73–74. The value ranges used in Table 8 are the same as were used in Tables 7 & 8 of the Illinois study. Dunham at 250.

83. The community property agreement was the method most often used by married persons to transfer their property at death. It was used by 31 (49.21%) of the 63 married decedents who had inheritance tax estates. *See* columns (1) & (2), Table 10 *infra*.

84. Four of the small estates of married persons in the study were entirely set aside to the surviving spouse under the award in lieu of homestead procedure. WASH. REV. CODE ch. 11.52 (Supp. 1972).

85. WASH. REV. CODE §§ 11.62.010–.020 (Supp. 1974), added by, Ch. 117, §§ 4–5 [1974] Wash. Laws 1st Ex. Sess., 286–88. The procedure is only available where the estate subject to administration does not exceed $10,000. *Id.*

It is not possible to generalize about the eight decedents who used survivorship bank accounts, personal property joint tenancies or other methods to transfer the bulk of their transmissible property. At least one such transfer occurred for each of the six classes of estate size.

The mean and median size of inheritance tax estates for testate, intestate and community property agreement estates are shown in Table 9. The means range from $9,954 for intestate estates, through $17,119 for community property agreement estates, to $66,954 for testate estates. By way of comparison, the Illinois study reported gross means of $41,885 for testate estates and $7,920 for intestate estates and the Ohio study reported $35,160 for testate estates and $6,694 for intestate estates.[86]

TABLE 9

MEAN AND MEDIAN SIZE OF TESTATE, INTESTATE AND COMMUNITY PROPERTY AGREEMENT ESTATES, DISTRIBUTED BY SEX

	Number	Mean	Median
Testate:			
Male	28	$64,031	$23,950
Female	31	69,594	25,962
Total	59	66,954	25,962
Intestate:			
Male	10	6,896	7,413
Female	6	15,051	10,775
Total	16	9,954	11,497
CPA:			
Male	27	16,845	12,000
Female	4	18,968	19,188
Total	31	17,119	12,250

86. Dunham at 264; Sussman, Cates & Smith at 73. A recent study indicated that in Idaho:

> [I]n 1971 the average gross estate was $39,748.39, while the median gross estate was $27,707.60. In 1973, the average gross estate was $62,723.29 and the median gross estate was $28,788.63.

M. Classification According to Relationship of Surviving Kin

Decedents with inheritance tax estates are classified in Table 10 according to: (1) the principal method of transferring property; (2)

TABLE 10

INHERITANCE TAX ESTATES DISTRIBUTED BY PRINCIPAL METHOD OF TRANSFERRING PROPERTY, SEX OF DECEDENT AND RELATIONSHIP OF SURVIVORS

	Relationship of Survivors						
	Married at Death			Unmarried at Death			
	Spouse Alone (1)	Spouse &Children (2)	Children-No Spouse (3)	Parents (4)	Collaterals (5)	No Relations (6)	Total (7)
Testate:							
Male	5	12	7	—	1	3	28
Female	—	5	15	—	10	1	31
Intestate:							
Male	—	4	4	1	—	1*	10
Female	—	3	2	1	—	—	6
CPA:							
Male	7	20	—	—	—	—	27
Female	—	4	—	—	—	—	4
Other:							
Male	1	2	—	—	—	—	3
Female	—	—	4	—	1	—	5
Total	13	50	32	2	12	5	114
Percentage of Total (Col. 7)	11.40%	43.86%	28.07%	1.75%	10.53%	4.39%	100.00%

* An insolvent estate for which the proceedings were instituted by a creditor for insurance claim purposes.

Kinsey, *A Contrast of Trends in Administrative Costs in Decedents' Estates Between a Uniform Probate Code State (Idaho) and a Non-Uniform Probate Code State (North Dakota)*, 50 N.D.L. Rev. 523, 527 (1974).

sex; and (3) the relationship of surviving kin, if any. Columns (1) and (2) reveal that 63 (55.26 percent) of the decedents were survived by their spouses. In 43.86 percent of the cases the decedents were survived by a spouse and children (column (2)). Thirty-one (49.21 percent) of the 63 married decedents died with community property agreements in effect, 22 (34.92 percent) had testate administration proceedings, 7 (11.11 percent) had intestate proceedings, and only 3 (4.76 percent) transferred their property by other probate avoidance devices. Overall, almost 72 percent of the decedents were survived by children.[87]

The Ohio study noted that decedents survived only by collateral kin had the lowest rate of testacy (61.38%)[88] although they probably had the most freedom to make an unfettered disposition of their property. Curiously, the present study disclosed a 100% testacy rate for decedents with estate proceedings who were survived by collaterals only (column (5), testate and intestate classifications). Fifteen (88.24 percent) of the 17 decedents who were survived by either collaterals only (column (5)) or no relations at all (column (6)) were testate. This data suggests that persons with only collateral relatives are *very* concerned about the disposition of their property at death and frequently execute wills to record their preferences. Thirteen (81.25 percent) of the 16 intestate proceedings were conducted for decedents who were survived by a spouse and children, or children alone.

The high rate of testacy for persons with only collateral relations may be due to the unavailability of a survivorship device for unmarried persons similar to the community property agreement. Such persons, of course, could and did use survivorship bank accounts, joint tenancies and life insurance beneficiary designations to transfer specific assets to the chosen survivors. In the future, married and unmarried persons alike may be able to execute written survivorship agreements similar to the community property agreement under Washington's version of UPC § 6–201.[89] The bar should try to shape developments under that section to provide a larger segment of the public

87. Column (2) plus column (3).
88. Sussman, Cates and Smith at 72.
89. WASH. REV. CODE § 11.02.090 (Supp. 1974) (effective October 1, 1974). *See* note 17 *supra*.

with a simple and economical means of transferring property at death.[90] As noted above,[91] the generally satisfactory experience with community property agreements supports the desirability of making similar forms of survivorship agreements broadly available.

N. Dispositive Provisions of Instruments

The typical patterns of disposition by will are concisely summarized in the following passage from the Ohio study:[92]

> Previous studies of probate material highlighted two findings: (1) the devise and bequest of the entire estate to the spouse was the most frequent deviation from the intestate distribution, and (2) unrelated persons and institutions were infrequent beneficiaries. In this study, the pattern of giving the entire estate to the spouse was encountered more frequently in relatively small estates, and the pattern of willing to unrelated individuals and/or institutions was associated with either wealth or the absence of immediate family. The rationale is self-evident. The person with a limited estate has limited freedom. He cannot provide for his family and make bequests to others. In the case of a surviving spouse, the entire estate may be required for maintenance until death. The absence of immediate family, like the presence of wealth, is a situation of freedom for the testator. These two conditions provide the only possibility for divergence from the typical distribution.

The results of the present study are the same. Thus, in all jurisdictions studied, an overwhelming majority of the married testators have given all of their property to their surviving spouses. This strongly

90. The data collected in this study suggest that community property agreements involve less delay and are somewhat more economical than estate proceedings as property transfer mechanisms. *See* text accompanying note 133 *infra*.

91. *See* text accompanying note 15 *supra*.

92. Sussman, Cates & Smith at 86. The Illinois study reported:

> An examination of the 22 testate estates where the deceased was survived by spouse and children shows that 100 percent left all of the property to the surviving spouse contrary to the intestacy laws. In the 6 testate estates where there was a surviving spouse but no children all but 1 gave the surviving spouse all of the property in conformity with the intestacy law for personal property.

Dunham at 252–53. When the testator was survived by a spouse, but no lineal kin, the Ohio study reported that in 89.19% of the cases the testator gave his entire estate to the surviving spouse. Sussman, Cates & Smith at 86–87. About the same proportion (85.8%) of Ohio testators gave all of their estates to their surviving spouses when they were survived by lineal kin. *Id.* at 89.

suggests that a state's legal characterization of the spouse's respective ownership interests in marital property is not particularly important when the spouses actually plan for the disposition of their property at death.[93] Most spouses probably are actuated to leave their entire estate to their surviving spouse by a sense of responsibility for the survivor and a concern that the survivor may need all of the property the two have accumulated. As Professor Plager observed in 1966, "the married testator on the whole shows little inclination to avenge himself at death for the slights and frictions of marital bliss. If the balance is struck it is not done so publicly."[94] The considerations and actions may be different, however, where one or both spouses had been married more than once.[95]

O. Community Property Agreements

In all 31 instances in which decedents used community property agreements, all of the community property was given outright to the surviving spouse.[96] None of the decedents attempted to create legal or equitable future interests[97] or make any other unusual disposition of the community property. In 27 (87.10 percent) instances, the decedent was survived by spouse and children and in the other 4 (12.90 percent) instances by the spouse alone. Under the intestate succession

93. In effect, this finding confirms Professor Hahlo's observation:

> [T]he practical importance of the matrimonial property regime during the subsistence of a marriage should not be overestimated. To the poor who have little of value to give, share in, or leave on death, it matters but little whether they are married in community or separate as to property. Nor does it matter very much to the well-to-do as long as their relationship is harmonious.

Hahlo, *supra* note 4, at 455.

94. Plager, *supra* note 2, at 715.

95. The Ohio study found that decedents survived by a spouse and children of a prior marriage faced particularly difficult problems of discharging their responsibilities:

> If justice demands that the financial responsibilities of both marriages be met, this may be impossible unless the estate is large. Few of the decedents who remarried and who had minor estates resolved the situation to the satisfaction of family members.

Sussman, Cates & Smith at 91. The frequency of divorce and remarriage also complicates the task of designing an acceptable marital property reform proposal.

96. Two of the males who utilized community property agreements also owned separate property which was not subject to the agreement.

97. Professor Cross has suggested that "any conceivable disposition not otherwise proscribed could be made" by community property agreement, "even cutting off the survivor entirely or vesting only a life interest in the survivor with remainders over, *etc.*" Cross, *The Community Property Law in Washington*, 15 LA. L. REV. 640, 645 (1955).

law then in effect, the surviving spouse and the children each succeeded to a one-half interest in the community property of a married decedent.[98] Where a decedent was survived by neither children nor parents, the surviving spouse succeeded to all of the community property. Thus, the decedents who used community property agreements deviated from the disposition called for by the intestate succession law in 27 (87.10 percent) of 31 cases.

In 1974 the intestate succession law was changed to give all the community property of a married decedent to the surviving spouse regardless of the survivorship of children or parents.[99] The data suggest that the change accords with the intention of the vast majority of married decedents. However, all in all, it seems unlikely that the change will dissuade any significant number of married persons from expressing their intention regarding the disposition of their property at death. This surmise is based in part upon the large number of unmarried testate decedents who give their property to lineal or collateral descendants who would receive the property under the intestate succession law in any event.

P. Male Testators

Thirteen (76.47 percent) of the 17 testate married males in the sample left their entire estates to their widows. The wills of two other males gave substantially all of their property to their widows. One other male created a trust of all of his property for the benefit of his widow for life, remainder to their child.[100] Finally, one testator, who left an estate of approximately $350,000, made a substantial outright gift to his wife and created a charitable trust of most of the remainder of his estate. In all but four instances, the married male testators were also survived by children, who would have been entitled to share in their parent's separate and community property under the intestate succession law then in effect. Thus, the dispositions made in the wills deviated substantially from those called for by the intestate succession law.[101]

98. WASH. REV. CODE § 11.05.015 (Supp. 1974).
99. The change was effective with respect to decedents dying on or after October 1, 1974. *See* note 14 *supra*.
100. That disposition may reflect an effort to minimize the death taxes payable on the surviving spouse's subsequent death.
101. *See* text accompanying note 98 *supra*.

The data regarding community property agreements also indicate that most male married decedents are content to give their widows full control of their combined estates. The widows received all, or almost all, of the decedents' property under all 27 of the community property agreements which were effective upon a male's death, and under 15 of the 17 wills. The husbands' confidence in their widows is also indicated by the fact that widows were named as sole executors of 14 of the 17 wills. Appointment of the surviving spouse preserves the maximum amount of property within the family—the survivor will receive any compensation paid the personal representative.

The prevalence of outright dispositions to widows is perhaps another manifestation of two trends noted by Professor Friedman in his 1964 study of 19th century New Jersey wills. The first trend was an increase in the proportion of outright gifts and a decrease in the use of trusts, life estates and so forth:[102]

> As compared with 1850, the number of trusts is markedly less today, though differences between 1900 and the present are not dramatic. The legal life estate (and similar devices) has declined much more rapidly and decisively.

The second trend was a change in attitude toward the widow, which was evidenced by an increase in the proportion of husbands who left their property outright to their widows.[103]

None of the wills in the Washington sample required a surviving spouse to make any election to receive benefits under the decedent's will. Although the so-called widow's election will is widely discussed as an estate planning device, it was apparently infrequently used at the time these wills were drawn.[104]

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102. Friedman, *supra* note 2, at 41–42. Friedman found only five trusts established by the 59 wills for which there were estate proceedings, although a number of other wills provided for gifts in trust if the individual beneficiaries did not survive. Legal life estates were created by only 2 of the wills. *Id.*

103. *Id.* at 42–43.

104. However, the husband of one widow in the sample had apparently attempted to require her to transfer her interest in their community property to the corporate trustee named in his will. Upon the widow's death, no effect was given to her attempt to transfer her one-half of the community property to the trustee. The husband, who had died in 1968 and was not one of the decedents in the sample, left a will which transferred his entire estate in trust for the benefit of his wife for life, and thereafter for the benefit of four nonresident collateral relatives. The will did not require the wife to transfer her interest in the community property to the trust in order to receive the life interest in the trust. However, at the request of the husband

In all eight cases in which a male testator was survived by children but not by a spouse, the entire estate was left to the children. Most often each child was given an equal share of the decedent's estate regardless of the sex or the number of children. Unlike the dispositions made when the decedents were survived by spouses and children, these dispositions correspond exactly to the ones called for by the intestate succession law when a decedent is survived by descendants but not by a spouse.[105]

Q. Female Testators

Three (60 percent) of the five testate married females left their entire estates to their surviving spouses. In the other two instances, the testators gave their entire estates ($45,250 and $371,500) to descendants. Perhaps the surviving spouse was not provided for in these two

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and "in consideration of the execution of the said will by him," the wife executed a "deed and bill of sale" of her community interest in their property. The document, which was attached to the husband's will, undertook to quitclaim her interest to the corporate trustee upon probate of the husband's will, subject to the trust established by his will.

Because the widow was not required to transfer her interest in the community property to the trust, the arrangement would not qualify for the federal income, estate and gift tax advantages which depend upon the widow's receipt of "consideration" for her transfer. Despite that fact, the document executed by the wife during her husband's lifetime was presumably effective. Records do not indicate that she attempted to withdraw from the arrangement either prior or subsequent to her husband's death. The entire community estate was administered in the husband's estate and delivered to the trustee. Curiously, the "deed and bill of sale" was not mentioned in any other document in the files of the two estates and the value of her interest in the community property was also included as an asset in her estate. The reason for the inclusion is unclear, but the resulting increase in the compensation of the corporate executor and its attorneys for handling the uncomplicated estates was clear. The executor received $4,500 for administering the total $168,000 community property estate upon the husband's death and $3,750 more for administering the wife's estate. The inventory on file in the widow's estate reported $99,000 as her community property interest in her deceased husband's estate. The attorneys received $3,900 from the husband's estate and $3,750 from the widow's estate. Although a corporate executor was involved, which simplifies the attorney's job considerably, the fees were barely below the minimum fees recommended by the local bar association.

The estates were not consolidated and the files do not reflect any other efforts to reduce the amount of the executor's and attorney's fees. Further, the files do not indicate whether during the administration of the widow's estate the corporate executor also received compensation as trustee for management of the same assets. The nonresidence of the trust beneficiaries may have influenced the attorneys and the corporate fiduciary in setting their fees. At the very least the plan and documents prepared by the attorneys were deficient and the fees received by the corporate executor and its attorneys were very liberal under the circumstances.

105. WASH. REV. CODE § 11.04.015(2)(a) (Supp. 1972).

cases in order to avoid increasing his estate for tax purposes. Such a motive is suggested by the lack of any indication of hostility between the spouses in both cases. The surviving spouse was named as executor in four of the five wills. None of the dispositions made by the five married female testators corresponded to those called for by the intestate succession law. In every case either a surviving husband or child was not provided for although entitled to receive a share of the decedent's property had she died intestate.

Eleven (73.33 percent) of the 15 widowed and divorced female testators who were survived by children, gave all of their property to their surviving children in substantially equal shares. In the other four cases, either the children did not receive equal shares or substantial gifts were also made to other relatives. The testate dispositions made by both male and female testators who were survived by children but not spouses, generally conformed to the intestate succession law.

Six of the female testators who were never married and three of the widows were survived only by collateral relatives. In one case, the decedent's will made small bequests to a nephew and his children and gave the remainder of her estate to six charities. Another decedent gave her estate to the trustee of a testamentary trust established for the benefit of her collateral relatives and those of her predeceased husband.[106] Unequal distributions were made to surviving collateral relations in two other cases. The remaining five wills distributed the decedent's property among collaterals in substantially the manner called for by the intestate succession law.

Overall, the community property agreements and wills of both male and female decedents made simple dispositions of their property—typically outright to the surviving spouse or children. Few of the wills created trusts or legal life estates. The dispositive patterns did not appear to be significantly affected by the sex of either the decedent or the surviving relatives. As noted above, the married male decedents apparently had confidence in the ability of their widows to manage their property—42 of the 44 males (95.45 percent) who died with community property agreements or wills in effect transferred substantially all of their property to their widows outright. There was virtually no indication that spouses of either sex used dispositive instruments to deprive the surviving spouse of any of the property the

106. The circumstances of this estate are more fully described in note 104 *supra*.

couple had accumulated during marriage. In these important regards, the dispositive practices of spouses in a community property jurisdiction are entirely consistent with those of spouses in common law property jurisdictions.

R. Testators with No Surviving Relatives and Gifts to Charities

The three male testators not survived by any relatives gave their estates to friends; none gave any property to charity. One married male testator transferred a substantial portion of his property to a charitable trust. The lone female testator who was not survived by any relatives gave substantially all of her estate to charity. Two female testators, who were survived only by a grandchild and a nephew respectively, also gave substantially all of their estates to charity. Overall, four (6.78 percent) of the 59 decedents with testate proceedings made substantial charitable gifts at death.

The Ohio and Illinois studies also found that substantial charitable gifts were most frequently made by decedents whose closest surviving relatives were collaterals.[107] Individuals with only remote living relations evidently feel less obligated to provide for such relations by will and consequently feel a greater degree of testamentary freedom. The Ohio and Illinois studies reveal that a modest mumber of persons will exercise that freedom by making testamentary gifts to charities.[108] Other data indicate that some charitable gifts are made at death by persons of all economic levels.[109]

S. Composition of Inheritance Tax Estates

According to the inheritance tax and probate files, the estates of the married decedents were composed almost entirely of community property. The files indicated that 20 of the 22 testate estates and 29 of the 31 community property agreement estates were entirely community in

107. Dunham at 254; Sussman, Cates & Smith at 114.

108. *Id.* Unfortunately, neither study indicated the sex of the testators who made gifts to charities.

109. An analysis of total Washington inheritance tax collections for the calendar year 1970, made by Professor Richard O. Kummert of the University of Washington School of Law for the Inheritance Tax Division of the Washington State Department of Revenue, indicated that some charitable transfers were made by decedents in all ranges of wealth. The following table summarizes that data, which was collected from the 7,639 estates which paid some inheritance tax in 1970. Thus, the table does not

character. All property owned by the two married decedents who transmitted their property by other types of survivorship devices was also community in character.

Initially, the character of property as community or separate is fixed by its time and manner of acquisition.[110] Its character, however, may be modified by subsequent action or agreement of the spouses. Under Washington law, the spouses may validly agree regarding the character of both presently owned and after acquired property.[111] Seven (22.58 percent) of the 31 community property agreements used by decedents in the sample expressly stated that all of the property then owned or thereafter acquired by the parties was their community property. The other 24 agreements applied only to the existing community property of the parties.

The property of all decedents who died unmarried was entirely individually owned. The extent to which property owned by previously married decedents was attributable to transfers made to them by their predeceased spouses could not be determined from the files.

Table 11 shows the frequency with which various kinds of assets were encountered in the different types of inheritance tax estates.[112] Real property was the most common type of asset owned by the dece-

reflect instances in which substantially the entire estate was given to charity or was otherwise exempt from taxation and no inheritance tax was payable.

Size of Estates	Total Number of Estates	Total Bequests To Charity
$ 0- 10,000	974	$ 90,933
10,000- 35,000	3,111	625,506
35,000- 60,000	1,569	952,311
60,000-100,000	953	1,310,787
100,000-500,000	951	6,622,208
500,000 and over	81	5,168,648
Total	7,639	$14,272,292

Neither the data nor the table indicate the number of estates from which charitable bequests were made.

110. In brief, the separate property of a married person is the property owned by him prior to marriage or afterwards acquired by gift, devise or inheritance, together with the income derived from the same. All other property owned by married persons is their community property. *See* WASH. REV. CODE §§ 26.16.010–.030 (Supp. 1973).

111. Volz v. Zang, 113 Wash. 378, 104 P. 409 (1920). The subject of transactions and agreements between spouses is comprehensively discussed in Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729, 804–19 (1974).

112. The reliability of the data concerning assets is limited by the extent to which they were reported in probate and inheritance tax documents. Because of the requirements of title insurance companies and stock transfer agents, it seems probable that

dents. It was owned most often by decedents with community property agreements (83.87 percent) and least often by decedents who used other probate avoidance devices (37.50 percent). Considering the economic and family circumstances of the decedents, it seems probable that the real property involved was most often the family residence. The overall frequency of real property for all classes (70.18 percent) in this study contrasts sharply with the 46 percent rate which was observed in the Illinois study.[113] The difference between the King County, Washington, and Cook County, Illinois, rates may be attributable to King County's smaller population and lower population density, as well as differences in the characteristics of the populations, *e.g.*, ethnic and cultural composition.

TABLE 11

PERCENTAGE OF DIFFERENT TYPES OF INHERITANCE TAX ESTATES WHICH INCLUDED SELECTED TYPES OF ASSETS

Type of Estate	Total Number	Real Property (1)	Investment Securities (2)	Survivorship Bank Accounts (3)	Life Insurance on Decedent's Life (4)
Testate	59	71.19%	44.07%	45.76%	32.20%
Intestate	16	56.25	18.75	18.75	31.25
CPA	31	83.87	45.16	51.61	61.29
Other	8	37.50	37.50	75.00	25.00
Total	114	70.18%	40.35%	45.61%	39.47%

Investment securities were owned by decedents in the Washington study with about the same frequency (40.35 percent) as was recorded in the Illinois study (44 percent).[114] The frequency with which the decedents held an interest in one or more survivorship bank accounts is indicated in column (3). Although not clearly shown on the table, the survivorship accounts were particularly popular with husbands

the data for real property and investment securities is reasonably reliable. The less formal transfer requirements applicable to survivorship bank accounts and the life insurance may limit the reliability of the data shown for those types of assets.

113. Dunham at 265–66.

114. *Id.* at 266.

and wives.[115] The accounts are economical and effective means of transferring property at death. The public might make more use of multi-party survivorship bank accounts if POD accounts were clearly authorized, as they are in the UPC.[116] In addition, the more complete range of multiparty accounts and more complete statement of the law contained in Part I of Article VI of the UPC would be preferable to the existing law.

The frequency with which the decedents' lives were insured is indicated in column (4) of the table. The available information indicates that life insurance was the type of asset owned by the fewest number of individuals (39.47 percent) in the sample. The rate is low as compared with the population-at-large and the decedents in the Ohio study.[117] The rate may be low as compared to the population-at-large because of the advanced age of the decedents in the sample and the general absence of group insurance. Although group insurance accounted for one-third of the policies in force in Washington in 1969,[118] very few decedents in the sample were insured under group policies.

T. Delays and Costs of Transferring Property at Death

Estate administration proceedings involve delays which ordinarily do not arise when a decedent's property is effectively transferred by means of a community property agreement or other survivorship device. Estate proceedings also involve higher costs—principally be-

115. The study of personal property joint tenancies conducted by Professor Hines found that co-ownership "almost always involves a married couple" who intends the property to be owned entirely by the survivor. Hines, *Personal Property Joint Tenancies: More Law, Fact and Fancy*, 54 MINN. L. REV. 509, 550 (1970).

116. Part 1 of Article VI of the UPC authorizes the use of POD accounts. Although Part 2 of the Article, § 6-201, is not specifically concerned with multi-party accounts, it appears to authorize POD accounts: Under it "deposit agreements" may provide that "money or other benefits theretofore due to controlled or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing" without being considered testamentary in nature.

117. In 1969 the lives of 80% of the national population of adults and 74% of the regional population were insured. INSTITUTE OF LIFE INSURANCE, LIFE INSURANCE FACT BOOK 11 (1970) [hereinafter cited as FACT BOOK]. The survivors interviewed in the Ohio study reported that the lives of 79% of the decedents in the sample were insured. Sussman, Cates & Smith at 179.

118. Group certificates accounted for 1,372,000 of the total 4,164,000 policies in effect in Washington in 1969. FACT BOOK, *supra* note 117, at 20. Nationwide, the lives of 80% of the population between the ages of 55 and 64 were insured in 1969, but the percentage dropped to 62% for persons 65 and older. *Id.* at 11.

cause of higher attorneys' fees. Court costs and appraisers' fees also add slightly to the cost of estate proceedings.

1. Delays

The transfer of property pursuant to community property agreements or other survivorship devices requires little time and none of the delays typical of estate proceedings. Preparing and filing the necessary death tax returns need not involve substantial delays and do not ordinarily impede the prompt transfer of a decedent's property.

The overall time required to settle an estate includes two periods: (1) the time between death and the commencement of administration proceedings; and (2) the time from commencement to conclusion of the proceedings. The data indicate that proceedings were generally initiated in Washington within a reasonably short time after death. As shown in Table 12, 43 (72.88 percent) of the testate and 10 (62.50 percent) of the intestate proceedings were commenced within 1 month following death.

The Illinois and Ohio studies also reported that most proceedings were commenced promptly.[119] Thus, any public dissatisfaction with

TABLE 12

TIME ELAPSED BETWEEN DEATH AND INITIATION OF ESTATE ADMINISTRATION PROCEEDINGS DISTRIBUTED ACCORDING TO CONDITION OF TESTACY

Time Elapsed (in months)	Testate	Intestate	Total
Under 1	43	10	53
1–3	8	3	11
3–6	6	3	9
6–9	2	0	2
over 9	0	0	0
Total	59	16	75

119. Dunham at 268; Sussman, Cates & Smith at 230.

delays involved in the estate administration process cannot fairly be charged to tardiness in the commencement of proceedings.

The average time required to complete estate administrations, however, is somewhat excessive. Table 13 shows that an average of slightly over 18 months was required to complete the administration of the 49 testate estates which had been formally closed. All but two of the testate estates involved non-intervention executorships, which meant that very few court appearances and fewer documents were required. An average of almost 11 months was required to complete the administration of the 13 intestate estates which had been closed. There is no apparent reason why the administration of most of the other 10 testate and 3 intestate estates had not been completed.[120]

TABLE 13

AVERAGE TIME IN MONTHS BETWEEN INITIATION AND COMPLETION OF ESTATE ADMINISTRATION PROCEEDINGS, DISTRIBUTED BY VALUE OF PROBATE ESTATE AND CONDITION OF TESTACY*

Value of Probate Estate	Testate	Intestate	Total
$0– 4,999	14.00	6.50	9.71
5,000– 9,999	12.00	11.00	11.44
10,000–24,999	13.83	15.33	14.05
25,000–49,999	16.85	—	16.85
50,000–99,999	27.00	15.00	23.20
100,000 and over	24.38	—	24.38
Overall Average	18.06	10.92	16.56
Number of Estates	49	13	62*

* Ten testate and three intestate estates had not been closed. Thus, the total of estates closed is 62, whereas 75 estate administration proceedings were conducted as noted in Table 12, above.

The average time required for the administration of estates under $50,000 was unduly long in all four value classes. Most of these es-

120. One of the 10 testate estates which had not been formally closed was engaged in litigation which prevented its closure. The files do not indicate whether there is any legitimate reason why the other testate and intestate estates had not been closed.

tates were uncomplicated and could have been closed shortly after the 4-month period during which creditors must file their claims.[121] The inventory and appraisement could have been and often were filed within that period. The excessive time required for the administration of estates under $50,000 cannot fairly be attributed to the requirements of the tax laws or to tax planning; no federal estate tax return is required[122] and the preparation and filing of the necessary inheritance tax documents is neither demanding nor time consuming.[123] The closure of some estates may have been delayed in order to defer payment of the inheritance tax as long as possible and, thereby, preserve the use of the funds.[124] However, the amount of tax due from the estates of under $50,000 was often negligible and no inheritance tax at all was due from 21 of the testate estates.

By way of comparison, the Wisconsin study found that the average time required for the administration of estates ranged from 9.65 months for those of $20,000–25,000 in value to 11.08 months for those of under $2,000 in value.[125] More recent studies report that substantially longer periods were required: The Illinois study disclosed average times of 17 months and 15 months for the testate decedents in the 1953 and 1957 samples respectively;[126] the Ohio study found that

121. WASH. REV. CODE § 11.40.010 (Supp. 1974).

122. No federal estate tax return is required for estate of $60,000 or less. INT. REV. CODE OF 1954, § 6018.

123. The requirements of the federal and state death tax laws are frequently blamed for the long delays often involved in the settlement of estates:

> Those of us actively engaged in the practice of law realize, however, that even with much of the needless busy-work stripped from the "probate" process—as I believe the UPC has accomplished—inordinate amounts of time can be consumed in obtaining clearance from State and Federal taxing authorities.

Kinsey, *supra* note 72, at 527.

124. WASH. REV. CODE § 83.44.010 (Supp. 1973) was amended effective September 1, 1971, to impose an interest charge of 8% on the amount of the inheritance tax which was not paid within 9 months of death. Ch. 132, [1971] Wash. Laws 1st Ex. Sess. The advance of the time the state tax is due, together with the similar advance in the federal estate tax payment date, INT. REV. CODE OF 1954, § 6075(a), as amended, Excise, Estate and Gift Tax Adjustment Act of 1970, § 101(b), 84 Stat. 1836 (1970), may result in a reduction of the time required for the administration of estates. *See* Price, *Recent Tax Legislation—The Excise, Estate and Gift Tax Adjustment Act of 1970*, 47 WASH. L. REV. 237, 255 (1972). An empirical study of estates administered before and after the effective dates of the advances might indicate whether they measurably shortened the time required. Some commentators have suggested that the advances would reduce the time required. *See, e.g.*, Stevens, *Estate Tax Acceleration Promotes Efficient Administration*, 110 TRUSTS & ESTATES 168, 171 (1971).

125. Ward & Beuscher at 403.

126. Dunham at 269.

over one-half of the testate estates were settled between 9 and 15 months after death.[127]

The time required for the settlement of estates in Washington is not seriously out of line with other jurisdictions, but it could and should be reduced. Some reduction would occur if lawyers processed their estate administration work on a more current basis. Also, expedited processing would reduce the time lawyers lose refreshing themselves regarding an estate when some action is required. Overall, less lawyers' time would be required for each individual estate. The more expeditious handling of estates could also result in lawyers receiving compensation on a more current basis for their services. Finally, the lawyer's relations with the personal representative and other persons interested in the estate might also be improved if the proceedings were closed sooner.[128]

2. *Costs*

Where a decedent's personal representative was compensated, the cost was often substantial.[129] However, in most cases in the sample the personal representative was a relative of the decedent who served without compensation.[130] Sometimes a personal representative related to the decedent was paid—perhaps to minimize aggregate estate and

127. Sussman, Cates & Smith at 238. It is notable that 59% of the survivors interviewed in the Ohio study believed that the time required was unreasonably long. *Id.* at 260–61.

128. The Ohio study indicates that the resentment of the survivors over delay is reduced if the lawyers inform them of the statutory time limits involved in the estate administration process. Sussman, Cates & Smith at 261.

129. An average of $2,159.74 was paid in the 23 (39.98%) testate cases in which the representatives were compensated and an average of $382.75 in the 4 (25%) intestate cases. Combining the testate and intestate cases, an average commission of $1,896.48 was paid in 27 (36%) of the 75 estate proceedings. The amounts paid the representatives did not closely adhere to any schedule, although the compensation paid corporate fiduciaries was often equal to the amount of the attorney's fee. Curiously, in a number of instances the sole beneficiary of the estate was paid for serving as executor. The payments did not increase the amount of property the beneficiaries received from the estates, but the payments might increase the beneficiaries' gross income. Gross income "does not include the value of property acquired by gift, bequest, devise, or inheritance," INT. REV. CODE OF 1954, § 102, but it ordinarily does include compensation received for personal services. *Id.* § 61. In most cases, the estates were relatively small in size, which meant that the income and death tax deductions generated by the payment to the representative were of little or no use to the estate. A recent study of estate administration costs in North Dakota and Idaho reported that substantial average commissions were paid in those states. Kinsey, *supra* note 86, at 524–27.

income taxes payable by the estate and the survivors. Even in those cases, the funds stayed within the decedent's family. Unrelated persons served as personal representatives in a small number of cases.[131]

In the case of community property agreements, no personal representative was required and no costs were incurred on that account. In addition, the attorneys' fees paid were generally smaller than for comparably sized estates.[132] It is also notable that several of the surviving spouses apparently handled effectively the transfer of property pursuant to a community property agreement without professional assistance or cost. Significant involvement of survivors in the property-transfer process may be psychologically beneficial as well.[133]

An attorney's fee is most often the largest single cost of transferring a decedent's property. Although the practices involved in the establishment of the amount of the fee are not clear, the subject is probably not discussed in advance with the client as often as it should be. The minimum fee schedule issued by the local bar association was probably an influential factor in determining fees regardless of whether estate proceedings were involved. When the fee was subject to deter-

130. The following table shows the number of times persons in certain relationships were named as executor in the wills of decedents for whom estate proceedings were conducted. It also shows the number of instances in which they were paid for their services.

Relationship to Decedent	Times Named In Will as Executor	Total Times Paid Fee for Services
Spouse	22*	1
Child	16	5
Collateral Relative	4*	2
Unrelated Individual	6	5
Attorney	3	3
Corporation & Individual	2	0
Corporation Alone	5	7
Total	58	23

*In five instances the spouse named, and in one instance the collateral relative named, as executor predeceased the testator. The spouses were twice succeeded by corporations, twice by children and once by a person of unknown relationship to the decedent. The one collateral was succeeded by a collateral.

131. *See* note 130 *supra*. The same was found to be true in the Ohio study: "In 80 per cent of the testate cases, the executor was a spouse, child or child-in-law." Sussman, Cates & Smith at 232.

132. *See* Table 15 *infra*.

133. The survivors may be distracted or their grief otherwise assuaged if they assist in the preparation and filing of documents, *e.g.*, inventory and appraisements, tax returns and the like.

mination by the court,[134] the files examined in this study indicate that the maximum review was ordinarily a comparison of the proposed fee with the fee schedule.

Under the Seattle-King County Bar Association minimum fee schedule in effect in 1969, the fee for representing a personal representative was determined according to the value of the decedent's gross estate as reported for state inheritance or federal estate tax purposes, whichever was higher.[135] Only the decedent's equity in real property was included and up to $40,000 worth of insurance payable to persons other than the decedent's estate was excluded.[136] The entire value of the community property was included, but the portion of the fee attributable to community property was reduced by 25 percent.[137] The schedule itself follows:

Minimum fee	$175
For the first $5,000	5%
For the next $5,000	4%
For the next $10,000	3½%
For the next $180,000	3%
For the next $300,000	2½%
For amounts in excess of $500,000	2%

134. In 1969 fees were determinable by the court where there were intestate estate proceedings or testate proceedings which did not involve a non-intervention executorship. WASH. REV. CODE §11.48.210 (1963). The fees of a non-intervention executor and his attorney were not subject to the jurisdiction of the court unless either the executor submitted the matter to the court's jurisdiction or the fees were so excessive as to constitute "mulcting" the estate. In re Coates' Estate, 55 Wn. 2d 250, 260, 347 P.2d 875, 880 (1959). As a result of the doctrine that the matter of fees in non-intervention estates were not within the court's jurisdiction, beneficiaries often could not obtain any review of the fees of a non-intervention executor and his attorney. "Where [attorney's] fees are not submitted to the court for approval, those fees are not subject to determination or control by the court, absent faithlessness." Estate of Boston, 80 Wn. 2d 70, 73, 491 P.2d 1033, 1035 (1971). Even when the matter was submitted to the court, it sometimes allowed extraordinarily large attorneys' fees. For example, in Coffin's Estate, 7 Wn. App. 256, 499 P.2d 223 (1972), where there was a corporate executor which doubtless carried much of the burden normally assumed by counsel, the court confirmed a fee which was three times the amount specified on the minimum fee schedule.

The fees of the representative and his attorney, accountant and appraiser are now determined by the court at the request of the representative or any heir or beneficiacy. WASH. REV. CODE § 11.68.100 (Supp. 1974). The determinations are to be made in accordance with "court rules issued by the state supreme court." *Id.*

135. Seattle-King County Bar Association, Minimum Fee Schedule 9 (1968). A copy of the schedule is on file at the Library of the University of Washington School of Law.

136. *Id.*

137. *Id.* at 10.

Where the attorney also acted as personal representative, the schedule recommended that the minimum fee be increased by 50 percent, in which case the attorney should not receive a separate fee as personal representative. If the decedent's property was transferred pursuant to a community property agreement or joint tenancy, the fee schedule recommended:[138]

> [T]he fee shall be the same as for the probate of estates generally if the work required is comparable; but if the work required is more or less than for the probate of estates generally, the fee should be increased or decreased, based upon the time involved and the responsibility assumed. In no event should the fee be less than 1% of the value of the decedent's equity in the property transferred, or the value of the beneficial interest distributed or changed, but not less than $175.00.

Although the schedule has been abandoned by the local bar association,[139] it is no doubt still used as a guide by many attorneys in fixing their fees and by the courts in reviewing them. Some exchange of information within the bar concerning fees may be called for, but it is questionable whether attorneys' fees should be based upon tax valuations. These valuations bear little if any relation to the extent or character of the services performed or responsibility assumed by the attorney.[140]

The fees charged by attorneys in connection with the transfer of property in testate or intestate proceedings or pursuant to community property agreements are distributed on Table 14 according to whether they deviated more than 10 percent from the minimum fee recommended by the Seattle-King County Bar Association at the time. The fees were within 10 percent of the recommended amount for only about one-third of the estates. In nearly half the cases, the fees were more than 10 percent below the recommended amount while fees exceeded recommended amounts by more than 10 percent in only about 20 percent of the cases. The reasons for the deviations from the schedule are not explained by information in the files.

138. *Id.* at 11.

139. Use of the schedule was abandoned in March 1972. SEATTLE-KING COUNTY BAR ASSOCIATION BAR BULLETIN, March 1972, at 2.

140. Many responsible professional organizations have voiced the same criticism. *See, e.g.*, Council of the Section of Real Property, Probate and Trust Law, *Statement of Principles Regarding Probate Practices and Expenses*, 8 REAL PROP., PROBATE & TRUST J. 293, 293–95 (1973).

TABLE 14

EXTENT TO WHICH ATTORNEYS' FEES DEVIATED FROM MINIMUM FEE SCHEDULE RECOMMENDED BY SEATTLE-KING COUNTY BAR ASSOCIATION, 1969

	Number of Cases*	Within 10% of Rec. Fee	More than 10% *Above* Rec. Fee	More than 10% *Below* Rec. Fee
Testate	52	19 (36.53%)	10 (19.23%)	23 (44.23%)
Intestate	12	6 (50.00%)	2 (16.67%)	4 (33.33%)
CPA	13	0 ——	2 (15.38%)	11 (84.62%)
Total	77	25 (32.46%)	14 (18.18%)	38 (49.35%)

*Information regarding fees was available for 77 inheritance tax estates.

The Illinois study suggested that competition among lawyers for probate work prevented fee schedules from being adhered to or enforced.[141] However, it is questionable whether there is, or should be, price competition in the profession. In any event, competition is inhibited by the prohibition against advertising by lawyers. Also, it is not likely that many individuals shop around for the least expensive attorney. Survivors probably most often employ an attorney who was previously known to the family. This conclusion is supported by the Ohio study which found that in three-fourths of the cases, the survivors employed a lawyer who had previously done legal work for the decedent or the representative or was otherwise known by the survivors.[142]

The relationship between the total amount of attorneys' fees charged to the testate, intestate and community property agreement estates and the total value of the gross estates is shown in Table 15. The total inheritance tax values of the testate, intestate and community property estates are shown in column (1). The total amount of attorneys' fees appear in column (2), which also shows the percentage of each type of estate (column (1)) consumed by attorneys' fees. The total recommended minimum fees are shown in column (3), together

141. Dunham at 278.
142. Sussman, Cates & Smith at 252–53.

TABLE 15

DATA REGARDING ATTORNEYS' FEES

Type of Estate	Number	Total Gross Inheritance Tax Values of Estates (1)	Total Attorneys' Fees Charged (2)		Total Attorneys' Fees Per Schedule (3)	
			Amount	As a % of Estate	Amount	As a % of Estate
Testate	52	$4,681,308	$116,523	2.49%	$132,407	2.83%
Intestate	12	214,370	6,408	2.90	7,164	3.34
CPA	13	413,750	8,200	1.98	11,359	2.75
Total	77	$5,309,428	$131,131	2.47%	$150,930	2.84%

with the percentage of each type of estate such fees would have consumed. The data indicate: (1) the total amount of attorneys' fees paid aggregated almost 87 percent of the total amount of the recommended fees;[143] and (2) the fees paid constituted 2.47% of the inheritance tax value of the estates.[144]

U. Form, Length and Execution of Dispositive Instruments

As shown in Table 16 below, 63 (95.45 percent) of the wills in the sample were typewritten, 2 (3.03 percent) were on printed forms and 1 (1.52 percent) was handwritten. Presumably all of the typewritten wills were prepared with the assistance of a lawyer.[145] One of the printed wills had a lawyer's name stamped on it, which suggests that it also was prepared with legal assistance. The other printed will and the

143. The percentage was derived by dividing the total recommended fees (column (3)) into the total fees actually paid (column (2)).

144. By way of comparison, "In 1971, the average attorney's fee [in Idaho] was 3.5382% of the gross estate, while the median attorney's fee was 3.1510% of the gross estate. . . . In 1973, after the enactment of the Uniform Probate Code, the average attorney's fee was only 1.8017% of the gross estate, while the median attorney's fee was 2.3329% of the gross estate." Kinsey, *supra* note 86, at 526–27.

145. The form appearance and language of the typewritten wills suggests that all of them were prepared in lawyers' offices. The same assumption was made in the Illnois study. Dunham at 280.

one handwritten will were probably prepared without any legal assistance. Only 10 (32.26 percent) of the community property agreements were typewritten while 21 (67.74 percent) were printed. Fifteen (48.39 percent) of the community property agreements bore some indicia of a lawyer having participated in their preparation or execution.[146]

TABLE 16

MANNER OF PREPARATION OF DISPOSITIVE INSTRUMENTS

	Wills	CPA
Typewritten	63	10
Handwritten	1	—
Printed Form	2	21
Total	66	31

The relative paucity of printed wills is surprising considering the general availability of printed will forms and the frequency of printed community property agreements:[147] This and other studies indicate that a very small percentage of witnessed wills are entirely handwritten in states which do not recognize holographic wills.[148] A broader-based empirical study in a state, such as California,[149] which recog-

146. Either the agreement was acknowledged by a lawyer-notary or a lawyer's name was printed or stamped on the agreement.

147. The disparity in the frequency of use of printed forms of wills and community property agreements is probably due to a number of factors which include some public disinclination to become involved with lawyers, an acceptance of the view that wills should be prepared by lawyers and a generally favorable attitude toward the community property agreement as a probate avoidance device. The latter is engendered in part by educational efforts made by unions and possibly other organizations and by favorable word-of-mouth commentary.

The Wisconsin sample included 7.8% printed wills, Ward & Beuscher at 420, and the Illinois sample included 10%, Dunham at 280, compared to 3.03% found in the Washington sample.

148. The Illinois study reported that although Illinois did not recognize holographic wills, "about 2% of the wills in [the] 1953" sample were entirely handwritten. Dunham at 280. As the 1953 sample consisted of 58 instruments, presumably one of them was handwritten. The study did not indicate whether any of the 40 instruments in the 1957 sample were handwritten.

Washington does not recognize holographic or other unwitnessed wills unless a will is "executed without the state, in the mode prescribed by law, either of the place where executed or of the testator's domicile." WASH. REV. CODE § 11.12.020 (1963).

149. CAL. PROB. CODE § 53 (West 1956).

nizes holographic wills might generate some useful data regarding the frequency and adequacy of lay-prepared wills.[150]

The wills in the sample were also surprisingly short considering the space typically devoted to routine recitations regarding the place of residence and family status of the testator, the appointment of executors and execution by the testator and witnesses. Over 80 percent of the wills consisted of three pages or less.[151] Almost all the community property agreements consisted of only one page.

Although the brevity of the instruments is attributable in part to the simplicity of the dispositive provisions, it is also due to the frequent omission of some provisions which ordinarily should be included. For example, terms such as "issue"[152] were often left undefined and there were seldom directions as to the source of payment of death taxes and debts[153] or costs of administration.[154] In addition, some wills did not

150. Moreover, data regarding the adequacy of holographic wills may serve to augment data which suggest that the formalities required for execution of a will should be relaxed generally. *See* note 74 & accompanying text *supra*.

151.

LENGTH OF WILLS IN PAGES
BY SEX OF TESTATOR*

Length in Pages	Male	Female	Total
1	2	0	2
2	14	14	28
3	14	10	24
4	0	3	3
5	1	3	4
6	0	1	1
8	0	1	1
10	1	0	1
14	0	1	1
21	1	0	1
	33	33	66

*Codicils of one and two pages were added to the length of two and eight-page wills, respectively, in computing the length of the instrument.

152. In the event of uncertainty, the court may refer to the definitions contained in WASH. REV. CODE § 11.02.005 (1963). The statutory definitions, of course, do not always adequately or accurately resolve the question of the testator's intent.

153. In the absence of such directions, the federal estate tax is charged against the residuary estate, Seattle-First Nat'l Bank v. Macomber, 32 Wn. 2d 696, 702, 203 P.2d 1078, 1082 (1949), and the inheritance tax is charged against the inheritance of each beneficiary. Estate of Wilson, 8 Wn. App. 519, 507 P.2d 902 (1973), *petition for review denied*, 82 Wn. 2d 1010 (1973).

154. A testator may direct the source from which debts and costs of administration should be paid. WASH. REV. CODE § 11.56.150 (1963). In the event the testator fails to do so, they are first payable from the intestate portion of the estate, if any, *id.*, otherwise ordinarily from the residuary estate. *Id.* § 11.56.160.

include provisions for disposition of property in the event of the simultaneous deaths of the testator and the named beneficiaries[155] and often did not designate successor executors. Some wills also failed to make an alternate disposition of the estate in the event the named beneficiaries failed to survive the testator. None of the wills indicated whether they were executed pursuant to an agreement regarding the disposition of property. Particularly where relatives execute wills with similar or reciprocal provisions, the wills themselves should state whether they were executed pursuant to an agreement.[156] Even though these omissions did not appear to cause any significant problems for the estates included in the sample, they do cause some concern regarding the general standards of practice in the profession.

The apparent inattention to such important details may be a product of the minimal compensation received by lawyers for the preparation of wills during the period in question, principally 1959–1969.[157] As noted in the Ohio study:[158]

155. The provisions of the Uniform Simultaneous Death Act, WASH. REV. CODE ch. 11.05 (1963), do not always adequately deal with the property disposition problems which may arise in the event of simultaneous deaths. *See, e.g.*, Clises' Estate, 64 Wn. 2d 320, 391 P.2d 547 (1964); Morris v. Nowotny, 68 Wn. 2d 670, 415 P.2d 4 (1966).

156. The volume of litigation involving the question of whether the wills were executed pursuant to an agreement not to change the dispositive provisions after the death of the first party to die suggests the need to record the presence or absence of an agreement. That practice was suggested by the Washington Supreme Court in Arnold v. Beckman, 74 Wn. 2d 836, 839, 447 P.2d 184, 186 (1968):

> It now appears clear and obvious that if respondent's theory [that there was a binding agreement not to change the wills] is correct, some suitable mention of the testator's agreement in the wills or some independent writing containing it, would have eliminated our present problem and that such procedure would have been a wiser course of action. But Mr. Dodd [the attorney-draftsman] testified that he advised against doing so because he felt this would amount to "arms-length" dealing between husband and wife and that such a transaction would be harmful and damaging to the marriage relationship.

157. The Advisory Schedule of Minimum Fees adopted August 1962 by the Board of Governors of the Washington State Bar Association recommended a fee of $15 for the preparation of a single will and $25 for wills for a husband and wife. WASH. STATE BAR ASS'N, ADVISORY SCHEDULE OF MINIMUM FEES 7 (1962). The Seattle-King County Bar Association Minimum Fee Schedule, note 135 *supra*, suggested a minimum fee equal to the greater of the hourly rate for the time required to prepare the wills or $25 for a single simple will and $40 for wills for a husband and wife. *Id.* at 13. The recommended fee for preparing wills contrasts with the liberal fees recommended for estate proceedings. *See* text accompanying note 138 *supra*. The bar appears to be moving away from treating the preparation of wills as "loss leaders."

158. Sussman, Cates & Smith at 221. A preliminary survey of client perceptions of the lawyer's role and performance as an estate planner, commissioned by the Real Property, Probate and Trust Section of the American Bar Association (the ABA Survey), indicated that most clients view the lawyer "almost as a notary public—a person who receives a fee to perform an uncomplicated task and who produces an

> Charges for what can be considered routine wills are low. From the time standpoint, the attorney is not adequately compensated if he puts in any time at all. The will has to be considered as "an accommodation for people you hope to get business from." Perhaps the attorneys' approach toward will drafting can best be summed up with the words of one sample member: "If you wanted to make your living drawing up wills, you'd be a hungry boy."

The trend toward determining the fees for the preparation of wills according to the time devoted to the task and the general abandonment of minimum fee schedules may lead lawyers to devote more attention to this facet of their practice. The increased use of automated typing and duplicating equipment and the creative use of paraprofessional assistants will probably improve the overall quality, and the length, of wills.[159]

Only two wills in the sample (3.34 percent) were modified by codicils.[160] In both instances the wills and the codicils were typewritten, which suggests the participation of a lawyer. One codicil was executed on the same day as the original will; the codicil provided for the outright gift of a parcel of real property to a child of the testator, whereas the will poured the testator's entire estate over into a pre-existing trust for the child. In the other case, the codicil was executed more than two years after the will; the codicil made some slight changes in the provisions regarding a testamentary trust. The paucity of codicils indicates that an entirely new will is ordinarily prepared when a change in a previous will is desired. This accords with Professor Thomas Atkinson's advice, "As a whole, codicils should be avoided. . . . It is better to prepare an entirely new instrument when a change of testamentary scheme is desired."[161] There was no indication of any attempts to amend any of the community property agreements.

All of the wills in the sample appeared to have been validly executed by the testator and the requisite number of witnesses. Fifty-three (80.30) percent wills were subscribed by two witnesses and 13 (19.70

'official' document, one that will 'stand up in court.' " Kram, *Estate Planning: The Public's Perceptions and Attitudes*, 8 REAL PROP., PROBATE & TRUST J. 489, 493 (1973).

159. The ABA Survey concluded that clients generally "accepted the role of the paralegal and all accepted the use of automatic equipment." *Id.*

160. Codicils of one and two pages in length were used to modify wills of two and eight pages, respectively.

161. T. ATKINSON, WILLS 835 (2d ed. 1953).

percent) by three witnesses.[162] None of the beneficiaries named in the wills acted as a witness and, hence, none of their gifts were jeopardized by Washington's purging statute.[163] Some of the wills were witnessed by the attorneys who prepared them or by the persons named as executors. Attestation clauses were relatively common. Because the wills covered by the study almost all antedated the adoption of the self-proving affidavit procedure in 1969,[164] no self-proving affidavits were found. There were no challenges to the validity of instruments offered for probate,[165] although in one instance the extent of the decedent's interest in property acquired during marriage was litigated. One community property agreement in the sample was not acknowledged as required by the statute. The invalid agreement could not transfer the decedent's real property to his widow. Thus, at some point, estate administration proceedings may be required in order to perfect the widow's title to the property.

Considering the transient nature of our national population,[166] and the high proportion of decedents who lived part of their lifetimes outside Washington,[167] it is surprising that none of the wills bore any indicia of having been executed in another jurisdiction. On the other

162. Although Washington requires only two witnesses, WASH. REV. CODE § 11.12.020 (1963), it is desirable to use three so as to comply with the requirements of all of the states. *See* 1 A. CASNER, ESTATE PLANNING 50–51 (3d ed. 1961).

163. WASH. REV. CODE § 11.12.160 (1963) provides that gifts to necessary witnesses are void except to the extent the gifts do not exceed the intestate shares of the witnesses. It is malpractice for an attorney to permit a beneficiary under a will to act as one of the necessary witnesses. Shirmer v. Nethercutt, 157 Wash. 172, 288 P. 265 (1930).

164. Under WASH. REV. CODE § 11.20.020(2) (Supp. 1972), the facts necessary to prove a will may be established by an affidavit appearing on the will or a photographic copy of it, providing it was executed by the attesting witnesses at the request of the testator or after his death at the request of the executor named in the will or some person interested under it. The convenience offered by the procedure has led many law firms to add a standardized affidavit to their will forms. The witnesses should execute *both* the will and the affidavit. Execution of the self-proving affidavit alone may not constitute the necessary subscription of the will. *See* Boren v. Boren, 402 S.W.2d 728 (Tex. 1966).

165. The Wisconsin study reported that will contests were filed in 6 of the 166 testate proceedings (3.6%) in the sample. Ward & Beuscher at 415–16. Four of the contests were withdrawn and the other two were resolved in favor of the contestants. *Id.* Will contests were filed in 1% of the wills examined in the Ohio study. Sussman, Cates & Smith at 184. Powell and Looker reported that in the period between 1923 and 1930 in New York County, New York, 4.25% of the wills were contested and "only 10.44% of those contested are rejected." Powell & Looker, *supra* note 2, at 932. All of the studies found that contests are infrequent and most often unsuccessful.

166. In the period from March 1969 to March 1970 the national population had an interstate mobility rate of 3.6%. U.S. BUREAU OF THE CENSUS, MOBILITY OF POPULATION OF THE U.S. MARCH 1969–MARCH 1970, at 7 (1971).

167. Almost 67% of the total sample were born outside Washington. *See* notes 37 & 38 *supra.*

hand, persons as old as the decedents in the sample change residences infrequently.[168] In addition, most of the elderly decedents probably spent several years in Washington prior to death. The latter conclusion is suggested by the average age of the wills and the number which had been executed in Washington. As noted above,[169] the wills were an average of 83.24 months old at the time of the testator's death. Thirty-two (48.48 percent) of the wills recited that they had been executed at locations in Washington. Three (4.55 percent) additional wills carried some indicia of local execution, *e.g.*, the wills were typed on paper which bore a local lawyer's name and address. The overwhelming preponderance of community property in the estates of married decedents is also indicative of a lengthy period of residence in Washington (or possibly another of the community property jurisdictions).[170] None of the community property agreements appeared to have been executed outside the state.

Twenty-eight (90.32 percent) of the community property agreements were recorded—18 (58.06 percent) were recorded within 1 month of the time of execution; 3 (9.68 percent) more than 1 month after execution, but prior to death; and 7 (22.58 percent) sometime after death. The agreements may be recorded prior to death in order to protect against the risk of loss and to preclude tampering with them. The increased difficulty of changing or revoking a recorded agreement is one drawback of the practice. For example, some serious evidentiary problems may arise if revocation is attempted without recordation of a revocatory instrument. Proof of recission, mutual abandonment or some other possibly effective informal means of revocation is difficult.[171] Also, it is unclear whether a presumption of revocation would be applicable if the original of an agreement is

168. The mean age of decedents in the sample was 68.54 years. *See* Table 1 *supra*. The national mobility rate for persons 65 and over was 1.0% from March 1969–March 1970. U.S. BUREAU OF THE CENSUS, *supra* note 166, at 11.

169. *See* text following note 74 *supra*.

170. The probate and inheritance tax documents indicated that the estates of all 6 of the married testate females were entirely composed of community property. The same was true of 17 of the 21 married male testators in the sample. Part of the estates of the other 4 married males was also composed of community property.

171. Two recent cases illustrate the unwillingness of courts to find a recission or mutual abandonment of a community property agreement. Wittman's Estate, 58 Wn. 2d 841, 365 P.2d 17 (1961); Estate of Lyman, 7 Wn. App. 945, 503 P.2d 1127 (1972), *aff'd*, 82 Wn. 2d 693, 512 P.2d 1093 (1973). In *Wittman's Estate*, each party had executed a will which was at least partially inconsistent with the survivorship feature of the agreement, but no recission resulted because the court found that there was no evidence that either party knew that the other had made such a will. In *Lyman*, the court denied effect to an inconsistent will executed by the husband after his wife had

shown to have been in the custody of the parties, but cannot be located after the death of one party.[172]

V. Inheritance Tax Collections

An analysis and evaluation of the inheritance tax law is beyond the scope of this article. However, the data generated by the study suggest that the structure and impact of the law should be examined in detail. It reveals that the existing state law requires inheritance tax returns of a large number of estates from which no tax is due. Specifically, columns (1) and (4) of Table 17 show that no transfer tax was paid by 49 (42.98 percent) of the 114 decedents with inheritance tax estates. Columns (3) and (4) show that almost 80 percent of the inheritance tax collections were derived from the small number of estates which were required to file federal estate tax returns, *i.e.*, ones which exceeded $60,000 in value.[173]

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commenced divorce proceedings against him. The court found that the validity of the community property agreement was not affected by the proceedings and, echoing *Wittman's Estate,* that the agreement was unaffected by the execution of the will without the knowledge or acquiesence of the wife.

172. The presumption of revocation applicable to wills which cannot be located after death might also apply to community property agreements. "The law presumes that a will proved to have been in existence and not found at the death of the testator was destroyed by him *animo revocandi* . . . ." Harris' Estate, 10 Wash. 555, 560, 39 P. 148, 150 (1895). Conceivably, the presumption would not apply to a recorded instrument where the parties did not appear to have made any attempt to affect its validity.

173. A compilation of data regarding 1970 inheritance tax collections made by Professor Richard O. Kummert of the University of Washington School of Law for the Inheritance Tax Division of the Washington State Department of Revenue showed 75% of the estates which paid some tax were less than $60,000 in value. However, these estates accounted for only 16% of the total inheritance tax collections for 1970. The data, a summary of which is on file at the University of Washington Law Review, showed that 7,639 estates paid some inheritance tax in 1970, which represents almost 51% of the number of inheritance tax proceedings opened in 1970. The data regarding inheritance tax collections are summarized below:

Size of Estate	Number for Year 1970	Total Estate Size	Total Tax Paid	Percentage of Total Tax Paid
$ 0- 10,000	974	$ 4,200,418		
10,000- 35,000	3,111	70,499,398	$ 427,121	1.62%
35,000- 60,000	1,569	71,972,798	2,017,791	7.66
60,000-100,000	953	73,613,622	2,957,923	11.23
100,000-500,000	951	174,570,921	11,894,040	45.15
500,000 and over	81	78,695,201	7,385,869	28.04
Total	7,639	$473,552,358	$26,342,449	100.00%

The overall effective rate of the inheritance tax for 1970 collections was 5.56%.

TABLE 17

NUMBER OF ESTATES PAYING INHERITANCE TAX AND AMOUNTS PAID, DISTRIBUTED ACCORDING TO METHOD OF TRANSFERRING PROPERTY*

	Estates Paying Neither Federal Nor State Tax (1)		Estates Paying Only State Tax (2)		Estates Paying Both Federal & State Tax (3)		Total No. Estates / Total Tax Paid (4)	
	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.
Testate	19	($0)	25	($31,766)	14	($126,583)	58	($158,349)
Intestate	14	($0)	2	(1,186)		——	16	(1,186)
CPA	14	($0)	15	(4,774)	2	(9,145)	31	(13,919)
Other	2	($0)	4	(1,370)	2	(3,650)	8	(5,020)
Total	49		46	($39,096)	18	($139,378)	113	($178,474)

* The table does not include one estate for which the inheritance and estate tax proceedings have not been concluded.

The data do not show the cost either to the state or to the survivors of requiring superfluous returns. The possible additional tax collections and other benefits derived from requiring all estates to file inheritance tax returns are also unknown. A more detailed study might be able to quantify the costs and the benefits of the requirement.

The administrative burden on the state's Inheritance and Gift Tax Division might be relieved by eliminating the large number of returns filed by estates from which no tax is due. Also, the number of small estates which are required to pay some tax might be reduced by increasing the size and character of the exemptions or by shifting to an estate-type of tax with a relatively large exemption.[174] The operation and effect of the present $40,000 life insurance exemption[175] should also be closely examined. As a matter of policy it is questionable whether $40,000 of life insurance payable to an unrelated person should be exempt from taxation while the transfer of a separately owned residence to a spouse is entirely subject to taxation.[176]

174. A similar proposal is made for North Dakota in Kinsey, *supra* note 86, at 527–28.

175. WASH. REV. CODE § 83.16.080 (1963).

176. The Washington inheritance tax law does not allow any marital deduction comparable to INT. REV. CODE OF 1954, § 2056, for separate property transferred to a surviving spouse.

An estate tax more closely resembling the federal model would simplify the death tax laws for all concerned. At the same time, other features such as a marital deduction, might be added which would make the death tax more equitable. A complete deferral of the federal transfer tax on interspousal transfers was proposed in 1969 as a means of simplifying the tax structure and increasing the amount of property available to a surviving spouse.[177] The reduction in tax collections which would result from these changes could be offset by changes in the rate structure.

III. CONCLUSION

The results of this study confirm the existence in a community property jurisdiction of many of the patterns of property ownership and disposition which had been observed in the earlier studies of common law jurisdictions. Spouses in all states generally leave all of their property to the surviving spouse at death. Exceptions exist principally in the case of large estates and decedents who have been married more than once. From these results, it can be inferred that the extent of each spouse's legal interest in marital property is not very significant insofar as the disposition of property at death is concerned. The study indicates that a larger proportion of decedents in this community property jurisdiction leave transmissible property at death. However, this may be due to the recency of this study, the relative prosperity of the 1960's and the impact of inflation. Estate administration proceedings continue to be conducted for a substantial proportion of Washington decedents despite their greater cost and delay.

The continuation of the trend toward testacy and effective lifetime planning was confirmed by the small number of intestate estates found in the study. However, perhaps due to the popularity of the community property agreement as a probate avoidance device, the proportion of decedents with estate proceedings is constantly declining.[178] A comparably simple survivorship device should be made available to all persons. R.C.W. § 11.02.090, the local counterpart of UPC §

177. HOUSE COMM. ON WAYS AND MEANS & SENATE COMM. ON FINANCE, 91st CONG., 1st SESS., TAX REFORM STUDIES AND PROPOSALS Part 3, 357–60 (Comm. Print 1969).

178. In the period 1967–1972 the number of inheritance tax returns filed with respect to decedents for whom no estate proceedings were had increased from 28.04%

6–201, could be amended to make one expressly available. In addition, the state inheritance tax law should be carefully studied to determine whether changes could be made which would make it more economical to administer, more equitable in operation and more easily understood.

In view of the mediocre level of legal competence indicated by some aspects of the wills and the estate proceedings, steps should be taken by the organized bar to improve the quality of the legal profession's services. Some improvement might result if attorneys were required to participate in specific continuing education programs or to take periodic qualifying examinations. In addition, will and estate administration forms could be standardized further and the progress of estate proceedings monitored more effectively. The latter might particularly reduce the delay and cost of administration proceedings. The 1974 legislation making the compensation of personal representatives and their lawyers reviewable by the court may cause attorneys' fees to bear a more reasonable relation to the value of their services. If it does not, some additional legislation might be in order.[179]

This and the earlier studies have demonstrated the value of estate administration files and inheritance tax records as sources of data regarding the transmission of property at death. The results of the studies are important to the continuing effort to understand and improve the operation of our legal institutions. Additional studies of the

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to 37.80%. The following table summarizes the information provided by the Inheritance Tax Division of the Washington State Department of Revenue:

Year	Total Number of Returns	Probate Returns	No Probate Returns
1967	14,357	10,331 (71.96%)	4,026 (28.04%)
1968	14,316	10,072 (70.35%)	4,244 (29.65%)
1969	14,914	10,150 (68.06%)	4,764 (31.94%)
1970	15,033	10,154 (67.54%)	4,879 (32.46%)
1971	14,957	9,508 (63.57%)	5,449 (36.43%)
1972	15,861	9,866 (62.20%)	5,995 (37.80%)

Letter from Roberta S. Kaiser, Counsel, Inheritance Tax Div. of the Wash. State Dep't. of Revenue, to John R. Price, January 8, 1974, copy is on file at Washington Law Review.

179. One commentator recently suggested that limiting the court to a review of the amount of the fees was "too timid":

> Rather than merely allowing the court to order refunds of excessive compensation, a provision should be added for penalizing the party receiving excessive compensation by requiring repayment of twice or three times the excess compensation. . . . If charging excessive amounts for services rendered is made a burden rather than an inconvenience, a deterrent is added to discourage the practice.

Kinsey, *supra* note 86, at 530.

same and related subjects should be conducted to expand the body of information available, to fill in some remaining blanks in the national picture and to facilitate more extensive comparative and trend analysis. Some studies should also be made of narrower topics, such as the extent of the use, safety and efficacy of holographic wills. The results of such a study would be of considerable value to states which are considering adoption of the UPC or other legislation which validates holographic wills. Studies of probate avoidance devices and related topics, such as those made by Professor William Hines on the use of joint tenancies in Iowa,[180] should also be encouraged. In the end, hard data, unlike hard cases, probably makes for good law.

180. Hines, *Personal Property Joint Tenancies: More Law, Fact and Fancy*, 54 MINN. L. REV. 509 (1970); Hines, *Real Property Joint Tenancies: Law, Fact and Fancy*, 51 IOWA L. REV. 582 (1966).